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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP A. YOUNG, MAX GOSSARD, ROBERT L. BROEKER, MARK BOKELMAN, JAMES ROHLF, OLIVER E. MOLDESTAD, LARRY GODEJAHN, EMERY PISTULKA, and ARTHUR REINSMA,
Petitioners,

vs.

STANDARD OIL (INDIANA) and AMOCO OIL COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. AS A MATTER OF PROCEDURAL FAIRNESS, CONSIDERING THE UNIQUE FACTS OF THIS CASE AND IN THE BEST INTEREST OF JUDICIAL ECONOMY, THE COURT SHOULD GRANT CERTIORARI OR NOT DENY CERTIORARI TO THE PETITIONERS PENDING THIS COURT'S DECISION IN *THE FIRESTONE TIRE & RUBBER CO., ET AL V. BRUCH, ET AL,* DKT. NO. 87-1054, SO THAT THE PETITIONERS' CASE SHALL NOT BE AJUDICATED MOOT AND PETITIONERS MAY RECEIVE THE BENEFIT OF THIS COURT'S WISDOM ON ITS DECISION TO BE RENDERED IN *FIRESTONE?*

2. THE SEVENTH CIRCUIT'S DECISION IGNORES THE GOOD FAITH REQUIREMENTS OF ERISA, ITS EQUITABLE NATURE IN GENERAL, BY NARROWLY APPLYING IN THE ARBITRARY AND CAPRICIOUS TEST TO REVIEW THE ACTIONS OF AMOCO WHO, UPON DETERMINATION OF ENTITLEMENT, FACED WITH PAYMENT OF SEVERANCE IN THE SUM OF $6,200,000.00, AMENDED ITS EXISTING SEVERANCE PLAN THROUGH CREATION OF A SPECIAL PLAN FOR THE F & P AIMED AT DISENTITLEMENT OF THE PETITIONERS?

3. DID THE LOWER COURT ERR IN INTERPRETING CONTRAVERTED FACTS, MINIMIZING DIFFERENCES OF INTERPRETATION OF FACTS, IN IGNORING CERTAIN FACTS, UNDER THE PROPER MATERIALITY TEST, IN FAVOR OF THE RESPONDENTS, THUS ABANDONING THE STANDARDS OF SUMMARY JUDGMENT REVIEW?

4. DID THE LOWER COURTS ERR IN IGNORING THE INTENT OF CONGRESS IN PASSING ERISA: AND EMASCULATE ERISA BY MAKING THE LAW MORE RESTRICTIVE THAN PRIOR TO THE PASSAGE OF ERISA BY ELIMINATING THE REMEDIES AVAILABLE PURSUANT TO STATE LAW, FEDERAL COMMON LAW, AND THE LAW OF CONTRACTS?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of this case in this Court. Petitioners requested this cause be heard as a class action defining those similarly situated as: the class consisting of approximately eight hundred individuals who were regular full time employees of Standard Oil of Indiana and/or Amoco Oil Company and/or Standard Oil (Maryland) in their Fertilizer and Pesticide Division or Department who were terminated from their employment after August 1, 1982, due to the cessation or sale of business of said Division and Department by Standard Oil (Maryland), Standard Oil of Indiana and/or Amoco Oil Company and who were wrongfully denied severance pay at the time of their termination. The number in the class can be indentified from the records of Standard Oil (Maryland), Standard Oil of Indiana and/or Amoco Oil Company.

The District Court Judge withheld ruling on Plaintiffs' Motion to Determine Propriety of Class Action, Certification of Class, and Proposed Notice to Class Members pending his ruling on Amoco's Motion for Summary Judgment.

To the best of Petitioners' knowledge, Respondents are Standard Oil (Indiana) and Amoco Oil Company which is a wholly owned subsidiary of Standard Oil (Indiana). Through discovery there appears to be no entity Standard Oil (Maryland). The Petitioners were employed by the Fertilizer and Pesticide Division or Department which was part of Amoco Oil Company. Since the commencement of this action, Respondent has made a name change to Amoco Corporation.

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PHILIP A. YOUNG, MAX GOSSARD, ROBERT L. BROEKER, MARK BOKELMAN, JAMES ROHLF, OLIVER E. MOLDESTAD, LARRY GODEJAHN, EMERY PISTULKA, and ARTHUR REINSMA,

Petitioners,

vs.

STANDARD OIL (INDIANA) and AMOCO OIL COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Philip A. Young, Max Gossard, Robert L. Broeker, Mark Bokelman, James Rohlf, Oliver E. Moldestad, Larry Godejahn, Emery Pistulka and Arthur Reinsma, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on June 23, 1988. That judgment involves the appropriate standard of review for welfare benefits under the Employee Retirement Income Security Act of 1974 "(ERISA") 29 U.S.C. §1001 et seq. and for summary judgment. These important questions are: (1) What standard of review to apply to a plan administrator's denial of welfare benefits; (2) does the standard of review include a requirement

of good faith both in the employer's actions in implementing, amending and administration (including educating and notification of employees concerning the plan) of said welfare plans; (3) was summary judgment appropriate when an employer/plan administrator conspired to avoid payment of severance and (4) have the Courts emasculated ERISA by ignoring Congressional intent through restrictive interpretation. There are irreconcilable differences between the circuits concerning each of these questions. Review by this Court is urgently needed to guide the lower courts and reaffirm ERISA's intent to benefit the lowly employee by providing him with the knowledge of what his benefits are and the statutory power to prevent employers from playing fast and loose with their employees' welfare benefit programs when ERISA requires, by direct statutory language and in equity, that certain standards be met.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 849 F.2d 1039 (7th Cir. 1988), and is reprinted in the Appendix hereto, A.25. The decision of the United States District Court for the Southern District of Indiana (Steckler, D.J.) is reported at 660 F.Supp. 587 (S.Ind. 1987) and is reprinted in the Appendix hereto, A.1.

JURISDICTION

Petitioners Young, Gossard, Brocker and Bokelman (on behalf of themselves and all others similarly situated) filed their original complaint in the Madison Circuit Court, Anderson, Indiana, alleging breaches of contract, fraud, unjust enrichment and negligence on October 11, 1983. On October 27, 1983, Respondents filed their Petition for Removal to the Federal District Court for the Southern District of Indiana, Indianapolis Division, alleging jurisdiction under ERISA. On the November 27, 1985, the District Court consolidated the Ohio case of Rohlf and the Minnesota cases of Moldestad, Godejahn, Pistulka and Reinsma into this cause.

On April 27, 1987, the Federal District Court for the Southern District of Indiana granted Respondents' Motions for Summary Judgment and for other relief. See A.1, infra. On Petitioners' appeal, the Court of Appeals for the Seventh Circuit affirmed the District Court's decision. See A.25. No petition for rehearing was sought as arguments were heard by three Justices for the Seventh Circuit. The judgment of the Court of Appeals was entered on June 23, 1988. The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254. A. 115.

STATUTES INVOLVED

This cause involves the Employees Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. §§1001 et seq. which provides for exclusive federal jurisdiction for employees benefit plans. Certain sections of ERISA are provided in the Appendix. (A.45-114)

STATEMENT OF THE CASE

Petitioners are former salaried non-union employees of Amoco Oil Company, a wholly owned subsidiary of Standard Oil (Indiana), (collectively "Amoco"). Petitioners were employed in Amoco's Fertilizer and Pesticides Division ("F&P") until September 30, 1983, when the Division was sold. The division had approximately 350 retail outlets covering eleven states.

In late 1981, Amoco received a recommendation from its financial consultant to divest the F&P.[1] Amoco began secretly searching for a buyer, but when no offers had been received by June, 1982, it was decided that the F&P would be liquidated in any manner possible.

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[1] The Boston Study also identified the fact that the most valuable salable asset of the Division was its employees.

When Amoco began the process of liquidating the F&P, the 1981 Severance Allowance Policy of Standard Oil Company and Participating Companies (which included Amoco) was in effect.[2] That policy provided that Amoco management could elect to "apply (the severance policy) to a particular employee-reduction situation," although these provisions were never made known to the employees. In addition, the severance policy also read as follows:

> 3. Even though the Policy may be in effect for a particular employee reduction situation, an employee will not qualify for a severance allowance under the following circumstances:
>
> g. Sale of facilities when the new owner offers to the employee comparable employment as determined by the Company.

In June, 1982, Amoco management sought permission to include all F&P employees under the terms of the 1981 Severance Policy. Management approval for this request was granted on July 13, 1982. Thus, under the terms of the 1981 policy, all employees of the F&P, who were not offered a comparable position by the Division's buyer, were entitled to severance.[3]

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[2] Standard Oil had continuously maintained a written severance pay plan for itself and subsidiary companies since at least 1965, several changes being made over time. The only general statement concerning severance made by Amoco to its F&P employees was contained in the 1970 "Stocker Letter" which simply stated that there was severance No SPD explaining severance was ever disseminated to the F&P employees nor was the whole text made available. However, they knew about the severance policy as the Petitioners, through their work experience with Amoco, knew of other employees who received it from Amoco when they were terminated and rehired by a Purchaser.

[3] The computation of severance was based upon years of Amoco employment and salary at time of termination. Comparable employment had been placement within the "Standard Family."

On August 2, 1982, long after Standard's decision to divest itself of the F&P the President of Amoco, requested Standard create a Special F&P Severance Policy. He wrote:

> [I]t is unlikely that potential buyers would provide wages or the level of benefits comparable to those presently offered by Amoco Oil. Under these conditions, all present [F&P] employees would probably qualify for severance benefits, regardless of employment opportunities with the new owners. Such payments would amount to approximately $6,200,000.
>
> Amoco recommends that a special severance . . . policy be adopted for the [F&P] divesture. . . .
>
> 1. Any . . . Amoco employee who is offered a position with a new owner will forfeit severance consideration, regardless of salary, benefits or position.[4]

An amended severance policy, per the president's memorandum, was approved on August 6, 1982, but was effective retroactively to August 1, 1982.

On August 3, 1982, Amoco sent a letter to the F&P employees announcing its plans to sell the division. The letter made a perfunctory reference to the employees' severance benefits rights, but did not mention that those rights had been made a part of a new policy. Thus, the employees were not made aware that they were now ineligible for benefits if they received *any* offer of employment from a potential purchaser. Nor did a later press release or a "Question & Answer" brochure address any change in the plan.

On April 29, 1983, the Scoular Company through Cropmate (a newly created subsidiary that was to be partially owned by former Amoco F&P management personnel) offered to purchase the remaining segments. In its offer, Scoular stated:

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[4] Several other amendments were also proposed to avoid or soften the economic impact of the divestiture on Amoco.

> Most of the retail outlets will be offered for sale to the present Amoco plant managers (crop guide managers) at 82.5% of net book value. The retail outlets will be leased back under long term agreements. Most of Amoco's employees, including the owner-manager [sic] of the leased retail outlets, will be offered comparable jobs.

This was the manner within which Scoular intended to raise the money necessary to consumate the purchase from Amoco.

On June 20, 1983, Amoco prepared a letter announcing F&P's sale to Scoular. The closing date of the sale was August 31, 1983. Thus, on September 1, 1983, F&P employees could consider themselves terminated by Amoco. The letter stated "the termination date will be used as the effective date of employment for those employees who are *offered and subsequently accept* employment with the Scoular company."

In July, 1983, Petitioners met with Cropmate representatives (Amoco employees who Petitioners knew as F&P management) to discuss a *business opportunity*. Petitioners were told that if they did not enter into the sale/leaseback agreements with Cropmate, their jobs were not guaranteed. No sale/leaseback agreements were closed as a result of this meeting. When the subject of severance was brought up, Petitioners were only told that they would not receive it because by being at the meeting they were being offered jobs. However, no employment was offered, just the opportunity to purchase their retail plants. Respondents admit that nothing in writing was given to the Petitioners concerning severance or a job offer.[5]

Shortly before August 31, 1983, Petitioners contend they were told to simply continue operating their facilities (as all had refused to yet enter the highly one sided leaseback

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[5] The Court ignored the testimony of Young who attempted to get information on severance from Amoco. When Young called the Respondents' Employee Relations office and asked for a copy of the severance plan, he was told that he could not have one.

arrangement). On September 1, 1983, eight of the nine petitioners went on the payroll for Cropmate. Petitioner Moldestad refused to work for Cropmate.

All the Petitioners except Broeker applied for severance, but were denied it by Amoco. Their claims were denied on the basis that they had received an offer of employment from Cropmate.

On November 27, 1985, Petitioners filed their second amended complaint under ERISA, consolidating three class actions. Petitioners alleged that Standard and Amoco's failure, both individually and as administrators of the severance plan, to pay the Petitioners' severance benefits constituted: (1) a wanton and willful breach of plaintiffs' employment contract; (2) unjust enrichment to Respondents; and (3) a wrongful, arbitrary and capricious denial of benefits based on a unilateral, after the fact, modification of the severance plan. Petitioners further alleged that Standard and Amoco negligently administered the severance policy, breached their fiduciary duty, and failed to provide information with regard to the unilateral creation of the special F&P severance policy or as to prior severance plans. Petitioners sought compensatory damages equal to their severance payments, punitive damages, statutory penalties under ERISA, and attorneys' fees. Respondents filed motions for summary judgment on all claims. Both sides then provided the Court with extensive briefs and reams of documentation.

The Court, on April 27, 1987, granted Respondents' motions for summary judgment finding that ERISA preempts all state and common law claims for severance benefits. The District Court ruled that Petitioners' primary remaining claim was that Respondents "acted wrongfully in creating the F&P Severance Policy in place of the 1981 Severance Policy to govern the F&P Division divestiture."

The District Court then determined that severance benefits are "welfare benefits" and that severance benefits are not subject to the stringent ERISA requirements governing retirement

benefits.[6] The Court ruled an employees' interest in severance benefits does not vest like retirement benefits and may be unilaterally abolished by the employer. It then determined that an employer does not breach a fiduciary duty when it unilaterally amends a severance benefit plan in a sale-of-business context to avoid coverage to employees who might continue to work for the purchaser. The Court found no breach of fiduciary duty by Respondents. The Court also granted Respondents' judgment on Petitioners' federal breach of contract claim indicating that ERISA does not contemplate that severance plans be treated as contracts. Finally, the Court granted judgment on the ERISA discrimination claim.

The Court then turned to the issue of the denial of petitioners' severance benefit claims. The District Court said:

> Petitioners further allege that the 'job offer' condition for severance under the F&P severance policy is 'arbitrary and capricious and in bad faith' because their jobs with Cropmate were or are unsecure unless they agreed to purchase from and lease back to Cropmate the retail outlets where they were employed. However, it is settled law under ERISA that plaintiffs may not challenge the substantive terms of a benefit plan as 'arbitrary and capricious,' and that a court may not redraw a plan's eligibility criteria to provide benefits to employees. . . .

The Court also held that the Petitioners had been informed of the requirements for obtaining benefits under the F&P severance plan and Petitioners were not prejudiced by any alleged procedural violations. Moreover, procedural violations could not give rise to a claim for benefits. Finally, the Court determined that the Respondents' decision to deny benefits was based on substantial evidence. The court found the denial of

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[6] At this point, the Court overlooks as irrelevant ERISA's disclosure and administration requirements common to all benefit plans whether welfare, pension or otherwise.

benefits appropriate given that all nine petitioners had been "offered employment" with Cropmate. This appeal followed.

On appeal, Petitioners contend summary judgment was inappropriate. Petitioners assert that the District Court resolved material issues of fact in the Respondents' favor. Petitioners contend that they qualified for benefits under the F&P severance plan because they were never offered employment with Cropmate prior to their termination from Amoco. Petitioners assert employment with Cropmate was conditioned on participation in the sale/leaseback arrangement, a fact of which Respondents were aware when Petitioners were terminated. Further, that the applicable plan is not the Special F&P Severance Plan but prior plans or Petitioners' understanding of the severance benefits due to Amoco's numerous procedural violations.

Respondents argue that all Petitioners either worked for or were offered a position with Cropmate. Respondents assert that it was undisputed that none of the Petitioners were required to purchase their retail outlets to become employed by Cropmate.[7] The Court found that Cropmate was looking for owner/managers for the retail facilities and therefore could not assure Petitioners continued employment in the event the individual outlets were resold, was not relevant to the fact of whether Petitioners were offered employment.

The Petitioners also contend summary judgment was inappropriate on their breach of fiduciary duty claim, arguing Amoco breached its duty when it unilaterally amended the 1981 severance plan (and prior policies) without providing any notice of the change to them on eve of entitlement. Respondents' repeated failure to provide information also contributed to this breach of duty.

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[7] Here the Court forgets that the Petitioners had no idea what would happen on September 1, 1983. They were not certain who they were working for until their first Cropmate paycheck.

Respondents state that with respect to severance benefit plans, ERISA does not impose a fiduciary duty on the employer to act exclusively in the interest of the employees. Respondents allege they were free to create the special F&P severance plan without notice to Petitioners. Conceding that some notice of the terms of the plan might have been required after "the new plan [was] implemented," Respondents argue that procedural violations arising from their failure to provide such notice does not amount to a substantive violation of ERISA.

Finally, Petitioners insist the District Court applied the wrong standard for reviewing the benefit plan administrator's decision to deny benefits. The District Court failed to examine whether Respondents acted in good faith or pursuant to ERISA procedure. Respondents counter by pointing out that good faith has never been an element in the standard for reviewing a decision to deny severance benefits in the Seventh Circuit. Thus, they argue that the lower Courts did not err.

This Petition for Writ of Certiorari follows the decision of the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

This Court has granted the Petition for Writ of Certiorari in the case of *Firestone Tire & Rubber Company et al. v. Bruch, et al.*, Dkt. 87-1054 which raises many of the same basic questions under ERISA concerning the standard of review for "welfare benefits" as does this case. If this Court fails to grant this Petition for Writ of Certiorari (or hold it in abeyance until a decision has been made in *Firestone* and remand it for proceedings consistent with the Court's decision), Petitioners' case will become moot and they will fail to benefit from the decision and wisdom of this Court on issues it has already decided to hear.

The circuits have taken a vast range of differing approaches for review of welfare benefit programs under ERISA. Certainly, Congress was attempting to protect the employee and create uniformity across the country with the passage of ERISA. The circuits have only created more confusion and have often taken a position that gives employees less protection of their benefits than was afforded pursuant to state law, federal common law and general contract principles prior to the passage of ERISA. Further, the lower Courts failed to find and heed the significance of the totality of all the facts presented by Petitioners pursuant to summary judgment principles.

If the abitrary and capricious standard of the Seventh Circuit is permitted to stand, no employee can be secure in his compensation for work performed. Employers will be allowed to play fast and loose with their benefits, a part of almost every modern employee's compensation package. Employees will never know if they have a benefit because employers will not be required to tell them exactly what it is and can change it without bothering to inform the employee. The arbitrary and capricious test, is *NO* test at all if benefit information is not promptly given to the employee, changes made to benefits are not given the proper notice and explanation to employees, employers can promise a benefit for years then renege when their own actions make it mature, etc. With many plans written in unclear or vague

language by the employer, when the administrator *is* the employer and his decision to deny benefits will save the employer substantial sums of money, the arbitrary and capricious review by the Courts as set forth by the Seventh Circuit is meaningless. The statute clearly did not anticipate this result and Courts must review the entire set of circumstances surrounding an administrator's decision. Surely, good faith is a requirement here, as in any other transaction between parties. One of the most crucial areas for Court to apply the scrutiny that ERISA intended is in the severance pay situation — the final act between employer and employee when the employer will have no consequences from the employee for his actions.

Without strict enforcement of the obligations and equitable rights set forth in ERISA for employers in their administration of welfare benefit plans, employees will be left in a far worse position than prior to the passage of ERISA. With strict enforcement, employers will be obligated, in all circuits, to fairly inform employees and not promise severance based on years in service, only to withdraw their promise when it comes due, in fact, when made due by the acts of the employer. The inequities of the system of review of the lower Court, in clear contravention of Congress' intent in passing ERISA, demonstrates the clear need for review and reversal by this Court.

I. As A Matter Of Procedural Fairness, Considering The Unique Facts Of This Case And In The Best Interest Of Judicial Economy, The Court Should Grant Certiorari Or Not Deny Certiorari To The Petitioners Pending This Court's Decision In *The Firestone Tire & Rubber Co., et al. v. Bruch, et al.*, Dkt. No. 87-1054, So That The Petitioners' Case Shall Not Be Adjudicated Moot And They May Receive The Benefit Of This Court's Wisdom On Its Decision To Be Rendered In *Firestone*?

The Petitioners respectfully request that a Writ of Certiorari be issued to review the June 23, 1988 judgment of the Seventh

Circuit. This judgment involves what standard of judicial review should apply to a plan fiduciary's denial of benefits under ERISA?

Review on a Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefore. S.Ct. Rule 17.1. Certiorari is normally granted by the Supreme Court where the Court of Appeals has rendered a decision in conflict with the decision of another circuit on the same matter, or has decided an important question of Federal Law which has not been, but should be, settled by the Supreme Court. See S.Ct. Rule 17.1(a) and 17.1(c). Certiorari is usually granted only in cases involving principles, the settlement of which is important to the public as distinguished from the parties. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, (1955); *NLRV v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951). Certainly, the proper standard of review concerning employees' welfare benefits has wide application.

The United States Supreme Court has already granted certiorari in another case in which although there are differences in the underlying facts, the issue regarding what standard of judicial review for Welfare Benefits under ERISA should apply is being presented to the Court for its consideration. See *Firestone, supra,* certiorari granted on April 4, 1988. Because the issues in the instant case are substantially similar to the issues raised in *Firestone,* the Court should also grant certiorari to protect Petitioners' rights pending a decision in the *Firestone* case. The Supreme Court has authority to grant certiorari in companion cases, to protect Petitioners' rights. See *Travis v. United States,* 364 U.S. 631, (1961). The Supreme Court should do the same thing in this case. Failure of the Supreme Court to grant certiorari to the Petitioners in this case pending the Court's ruling in *Firestone,* would in effect bar reconsideration of the instant case by the lower Court, based on *Firestone.* The Supreme Court should, at a minimum, grant a limited certiorari

to protect the Petitioners' rights pending the outcome in the *Firestone* case. Alternatively, the Petitioners request the Supreme Court grant full certiorari in this case, and combine this case with *Firestone* for consideration by the Court. Failure of the Supreme Court to grant the Petitioners herein certiorari, would deny them the benefit of receiving this Court's widsom on issues it has already agreed needs to be decided by the Supreme Court.

II. The Seventh Circuit's Decision Ignores The Good Faith Requirements Of ERISA, Its Equitable Nature In General, By Applying Narrowly The Arbitrary And Capricious Test To The Actions Of Amoco Who, Upon Determination Of Entitlement, Faced With Payment Of Severance In The Sum Of $6,200,000.00, Amended Its Existing Severance Plan Through Creation Of A Special Plan For The F&P Aimed At Disentitlement Of The Petitioners?

The heart of the lower Courts' decisions were the determination that the employer did not owe a fiduciary duty to the employees in developing the special F&P plan and that the implementation of that special plan was not arbitrary and capricious administration in denying the Petitioners' severance. *Argo v. Joint Plumbing Industry Board,* 623 F.2d 207 (2d Cir. 1980); as cited in *Baker v. Lukens Steel Co.,* 793 F.2d 509, 513-514 (3rd Cir. 1986). The modification by Amoco of its existing plan through the creation and implementation of the special F&P plan was arbitrary and capricious; therefore void. The *Argo* and *Baker* courts establish four (4) factors to be considered in reaching such a conclusion: (1) The extent to which the participant was an intended beneficiary of the plan; (2) The extent to which the amendment is applied retroactively to strip the participant of previously earned credits; (3) The extent to which he was notified of the amendment; and (4) The extent to which it is shown that actuarial concerns require denial of benefits to him. Clearly the Petitioners were intended participants in the 1981 Standard Severance plan and Amoco had

predetermined that they would not receive comparable employment when they were terminated from their Amoco jobs.[8] The irretrievable decision to sell or liquidate the F&P was made in early 1982.[9] The decision to modify the Standard plan through the creation and implementation of the special F&P plan was made in August, 1982, after determination that the Petitioners would all qualify for severance under the prior plan. No notice was ever given to the Petitioners of the changes which were to ultimately result in their wrongful denial of severance. Respondents presented no evidence of their inability to pay so factor 4 is inapplicable.

This Court, in *Massachusetts Mutual Life Insurance Company v. Russell,* 473 U.S. 134, (1985) clearly established the equitable nature of ERISA and its remedies as evidenced by 29 U.S.C. §503(a)(3) and its language.[10] This case clearly establishes the fiduciary relationship between the beneficiary and plan administrator in all respects as per the law of trusts.

Bruch v. Firestone Tire and Rubber Company, 828 F.2d 134 (3rd Cir. 1987) (cert. granted), asserts that arbitrary and capricious goes beyond a "four corners" review of the plan language. *Bruch* goes on to assert that less deference should be given a plan administrator's decision when the employer, one and the same as the administrator, can profit from its decision to deny benefits. *Dockray v. Phelps Dodge Corp.,* 801 F.2d 1149, 1152, 1153 (9th Cir. 1986). The District Court was in-

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[8] Amoco in previous situations (such as the Carpenter sale) paid severance when Amoco employees kept jobs with a purchaser.

[9] The District Court and Circuit Courts failed to comprehend the importance of the fact Respondents had already made the decision to terminate the Petitioners' employment in June 1982. The only remaining question was the actual date of termination.

[10] "Other appropriate equitable relief . . . to redress [ERISA] violations." 29 U.S.C. 1132(a)(3)

structed to consider the "factual background of the determination by a plan and inferences of lack of good faith, if any." Finally, *Bruch* suggests that the denial of severance is not subject to the arbitrary and capricious test at all, but is contractural in nature in that severance benefits are a form of wages. The benefits were offered as an inducement to *Bruch* employees to work for Firestone as in the instant case for Petitioners to continue to work for Amoco.

The discontent of the various circuits with the arbitrary and capricious test developed by the Seventh Circuit can be seen in the proliferation of various legal theories. Numerous circuits have expanded the good/bad faith issue not only in the administration of plans but amendments and terminations thereof. *Kaszuk v. Bakery & Confectionery Union Industry International Pension Fund,* 791 F.2d 548 (7th Circuit 1986); *Adcock v. Firestone Tire & Rubber Co.,* 616 F.Supp. 409 (6th Circuit 1985); *Blau v. Del Monte Corp.,* 748 F.2d 1348 (9th Cir. 1985), *cert. denied,* ____ U.S. ____ (1985), 106 S.Ct. 183 (1985). The following factors, among others, have been considered in finding the existence of good or bad faith:

1. Whether the employer has given adequate notice and disclosure concerning the plan and whether the full text of the plan was available to the employees or was kept confidential. *Adcock, supra; Blau, supra; Donovan v. Dillingham,* 688 F.2d 1367, 1372 (11th Circuit 1982); and, *Dependalh v. Falstaff Brewing Corp.,* 491 F.Supp. 1188, 1195 (E.D. Mo. 1980), *aff'd,* 653 F.2d 1208 (8th Cir.) *cert. denied,* 454 U.S. 968 (1981).

2. What has been the past practices of the employer in interpreting and implementing the benefit plan. *Harris v. Pullman Standard, Inc.,* 809 F.2d 1495 (11th Circuit 1987);

3. Whether there were procedural violations including, but not limited to failure to disclose the terms of a

plan and the provision of a meaningful claims procedure. *Blau, supra; Dependalh, supra; Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1985);

4. Whether the sale contract between the seller and purchaser binds the purchaser to offer continued benefits including severance. *Hamby v. Genesco, Inc.*, 627 S.W.2d 373 (Tenn.App. 1981) *cert. denied*, (Tenn. 1982); *Adcock v. Firestone Tire & Rubber Co.*, 616 F.Supp. 409, (6th Cir. 1985); *Calhoun v. Falstaff Brewing Corp.*, 478 F.Supp. 357 (E.D. Mo. 1979); *Dependalh, supra; Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2nd Cir. 1985); *Dahl v. Brunswick Corp.*, 227 Md. 471, 356 A.2d 221 (1976); *Petrella v. NL Industries*, 529 F.Supp. 1357, (N.D. N.J. 1982); Restatement of Contracts, First §§19, 22, 23, 29, 33.

5. Whether the benefit plan was amended or changed and if the employees were properly notified of same. Bad faith may and has been inferred when a change is made on the eve of entitlement to a benefit or without proper disclosure of said change. *Adcock, supra; Dependalh, supra; Calhoun, supra; Cf. Northeast Department ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 1147 (3d Cir. 1985); *Morgan v. Mullins*, 643 F.2d 1320 (8th Cir. 1981); *Scott, supra; Gilbert, supra; Harris, supra; Nivison v. Burney*, 228 Cal.Rptr. 106 (Cal. Ap. 2 Dist. 1986). These factors must be considered to determine what the employee might reasonably anticipate his benefits to be and to his entitlement to benefits promised by his employer.

In the case before the Court, the Respondents totally ignored the ERISA mandates of disclosure and all other applicable procedures, especially the provision of a meaningful claims procedure as mandated in 29 U.S.C. §1133. A-114.

A change in a severance policy which is for the employers' benefit alone and when made expressly in contemplation of actions which would otherwise entitle employees to previously provided benefits, is a clear violation of an employer/administrator's responsibility to discharge his duty as a fiduciary in the sole interest of the beneficiaries. 29 U.S.C. §1104 (a)(1); *Dependalh, supra,* at 1195; *Calhoun, supra.* Less deference is given to an employer's decision when it avoids a substantial outlay of funds. *Jung, et al v. FMC Corporation,* 755 F.2d 708 (9th Cir. 1985); *Adcock, supra; McLaughlin v. Connecticut General Life Insurance Co.,* 565 F.Supp. 434, 447 n.9 (N.D. Ca. 1983). An employer/administrator has a much greater temptation to act in its own best interest and disregard its fiduciary duty to its employees in a sale/termination situation because in denying severance, as opposed to other benefits, the employer need not measure the impact to the employee of the loss of the benefit and its effect on the employees continued job performance. *Scott, supra; Gilbert, supra.* We must address the question of why the Respondents disregarded the regular severance policies and secretly created the Special F & P Severance Policy. The answer is obvious: they did not want to pay $6,200,000.00 in severance if at all possible. In welfare benefit cases, there generally is no separate fund to be protected and a denial of benefits amounts to a protection of the profits of the employer. *Struble v. N.J. Brewery Emp. Welfare Trust Fund,* 732 F.2d 325, 334 (3d Cir. 1984); *Donovan v. Bierwirth,* 680 F.2d 263, 271 (2d Cir.), *cert. denied,* 459 U.S. 1069 (1982). Clearly, the Defendants were acting in bad faith when they secretly amended an already secret plan and implemented a new plan. This bad faith conduct reached greater heights as the Defendants, in conjunction with Scoular, attempted to finance the sale/purchase of the F & P with Amoco employees' personal money through the purchase/leaseback scam. To allow such bad faith conduct, a change in contemplation of entitlement coupled with Defendants' prior and subsequent behavior, would emasculate ERISA protection of unfunded welfare benefit plans and totally

deprive the F & P employees of reasonably anticipated severance in contravention of Congressional intent. 29 U.S.C. 1001 A-43-44; H.R. Rep. No. 93-807, 93d Cong., 2d Sess. *reprinted* in 1974 U.S. Code Cong. & Admin. News 4670, 4719; H.R. Rep. No. 93-533, 93rd Cong. 2d Sess., *reprinted* in 1974 U.S. Code Cong./Ad. News 4639, 4649; H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted* in 1974 U.S. Code Cong. & Ad. News 4646; 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits). Obviously, the good faith factor was persuasive to the *Adcock* Court when (as they had been charged by Justice Brennan to create a body of Federal Common Law to fill the gaps in ERISA concerning unfunded welfare plans) found that there existed an inchoate contractual interest in severance. *Massachusetts Mutual, supra; Adcock, supra.*

The employer/employee relationship is contractural in nature, and benefits are not mere gratuties, but are rights created in a bargained for exchange. *Hamby v. Genesco, Inc.*, 627 S.W. 373, 375 (Tenn.App. 1981) *cert. denied,* (Tenn. 1982); *Adcock, supra; Dependalh, supra; Scott, supra;* It is immaterial whether an employee pays for his welfare benefits with cash out of his pocket or simply by continuing to work. It is an offer of deferred compensation to the employee in return for better service, loyalty, and in the instant case, being the most valuable asset of the F & P Division. Application of simple contract law; offer, acceptance, and exchange of consideration applies. *See,* Restatement of Contracts, *supra.* By choosing to ignore all of ERISA's disclosure provisions, the Respondents led its employees to reasonably perceive that they would be paid severance on termination of Amoco employment regardless of immediate re-employment. The contract was ratified by the F & P employees continued loyal employment. *Dahl, supra* at 356.[11] *See generally* ERISA sections. A-45-114.

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[11] Employers do not have to offer employees any benefits if they so desire. However, if benefit packages are offered, employers must abide by the procedural requirements set forth in ERISA and by common equitable principals.

Finally, the Respondents are estopped due to bad faith by adding a secret amendment to an already secret severance plan. Estoppel may be found where the following elements exist: First, the party to be estopped must know the facts. Respondents had been planning to sell the F & P for almost a year prior to creating a new special severance policy for the F & P Division. Amoco also knew that the employees were its most valuable asset in the sale, not only by common sense, but also through the Boston Study. Second, the Employer must intend that its conduct will be acted on or must so act that the party asserting the estoppel had a right to believe that the benefit was so intended. Respondents had concealed its severance policy over the years by failing to issue an SPD but acknowledged that there was a policy by paying severance in other situations. Third, the employee must be ignorant of the true facts. None of the Petitioners had actually seen a severance pay policy or SPD at any time during their course of employment with the Defendants. The Petitioners had to rely on their day to day experiences wihin the company. Fourth, the employer must so act so that the party ascertaining the estoppel had the right to believe it was so intended. Amoco had paid severance numerous times in the past. It was general knowledge among the Petitioners that there was a severance policy. They had an idea of how it was paid and that it was paid on every occasion when an employee was terminated through no fault of his own regardless of the prospects of future employment. The Petitioners made a reasonable conclusion that there was a severance policy and it was paid when an employee was terminated through no fault of his own. Finally, Employees must rely on the employer's past conduct to their injury. It is obvious that the Petitioners firmly believe that Amoco had a severance pay policy which would protect them in the event they were no longer employed by Amoco, a very large, prosperous and stable company. A party is estopped when he induces another to understand and act upon that understanding. *Ellenburg, supra; Petrella, supra.* Defendants cannot ignore or amend away by il-

legal methods, the severance benefit reasonably expected and earned by the Plaintiffs.

If 29 U.S.C. §1001 et seq. means anything, it means that all parties should act in good faith in maintaining the integrity of all plans, both vested and nonvested. Respondents ignored all tenants of equity, good faith behaviour, and common sense. Respondents' argument is akin to that made by Humpty Dumpty in Lewis Carrol's Alice in Wonderland. "When I use a word," Humpty Dumpty said in rather scornful tone, "it means just what I choose it to mean -neither more nor less." Though perhaps well suited for a fairy tale, this logic fails here. *Ballard v. Commissioner of Internal Revenue,* ____ F.2d ____ (7th Cir. 1988). The Petitioners assert that the standard of review is more than the arbitrary and capricious review of an employer/administrator's interpretation of the words contained in a welfare plan written by the employer. The judicial review must insist on a standard of good faith considering all the prior and surrounding facts and not ignore the relevant black letter law of trusts, contracts and estoppel.

III. Did The Lower Courts Err In Interpreting Contraverted Facts, Minimizing Difference Of Interpretation Of Facts, In Ignoring Certain Facts Under The Proper Materiality Test In Favor Of The Respondents, Thus Abandoning The Standards Of Summary Judgment Review?

Rule 56(c) of the Federal Rules of Civil Procedure states that the judge shall issue a ruling for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Various courts have given further refinement to Rule 56. "All pleadings and supporting papers must be viewed in the light most favorable to the non-moving party." *Trulson v. Trane Co.,* 738 F.2d 770, 771 (7th Cir. 1984) citing *Korf v. Ball State University,* 726 F.2d

1222, 1226 (7th Cir. 1984); *Poller v. Columbia Broadcasting System,* 368 U.S. 464 (1962). In addition, the lower Court must grant all reasonable inferences that may be gleaned from the facts alleged by the non-moving parties. *United States v. Diebold, Inc.,* 369 U.S. 654 (1962); *Adickes v. Kress & Co.,* 398 U.S. 144 (1970).

Summary judgment should be used sparingly in complex litigation. Trial by paper is no substitute for an actual trial where witnesses can be observed, credibility weighed, and all facts go into evidence and are part of the record. *Poller, supra.* It is even less appropriate when a complex fact situation is compounded by the need to determine the intent, motive or conspiracy of the moving party. The need to judge such subtle things as state of mind and motive is clearly more appropriate by observation in a trial setting with *all* the evidence before the Court. *Baker, supra; Poller supra; Gifford v. Atchison, Topeka & Santa Fe Railway Co.,* 685 F.2d 1149 (9th Cir. 1982); *Mazaleski v. Treusdell,* 562 F.2d 701 (D.C. Cir. 1977).[12]

The most crutial requirement in the determination of the issue of summary judgment is that there be no genuine issue as to any *material* fact. C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure* §2725, pp. 93-95 (1983). Facts are not

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[12] Justice Brennan in his dissenting opinion in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986) warns against making summary judgment proceedings into a full-blown paper trial on the merits. A non-moving party should not have to submit all of his evidence on paper for summary judgment. At the time this suit was commenced, caselaw interpretaiton of ERISA was very limited. As caselaw has developed, different facts, not fully presented at the summary judgment level, have increased in importance. Further development by the Circuits has only been more complex and confusing: resulting in this Court's acceptance of the Petition for a Writ of Certiorari in *Firestone.* Petitioners submitted to the trial Court over 2600 pages of evidence which was only a portion of the evidence which could be presented at trial. Petitioners submit that evidence of such complexity should not be weighed without a trial setting - especially when intent, motives and conspiracy are issues.

to be simply determined in a vacuum. All inferences as to all facts combined or any combination are to be found in the favor of the non-moving party. The substantive law determines what facts in the case are relevant to the issues of the case. "While the materiality determination rests on the substantive law, it is the substantive law's indentification of which facts are critical and which facts are irrelevant that governs." *Anderson, supra* at 248. Summary judgment can only lie when a Court can determine which facts are material. The facts that are material and crutial to a decision comes from a determination of the appropriate law and its application to the facts presented. The lower Courts in this case erred in finding that there was only one material fact to determine their decision: The offering of jobs to the plaintiffs by the new company - but also erred in their finding of that single fact under the proper standards of summary judgment review.

The majority of the evidence submitted to the District Court showed that the Petitioners were never offered "Jobs" by Cropmate. In fact, the evidence presented by Petitioners was that the new company was exceedingly careful not to offer Petitioners employment but instead to offer them an "investment opportunity" by which they would be forced into a substantial capital outlay to purchase their individual retail outlets without assurance of employment. The lower courts took this complex case of a conspiracy to deprive the Petitioners of their severance pay and boiled it down to a single question, "Were Petitioners offered jobs?" The Seventh Circuit, even though it made an ultimate finding that Petitioners were offered jobs, admitted in its opinion A.30-31 that the facts *are* disputed on whether any employment offers were made by Cropmate. The lower Court failed to make all inferences in favor of the Petitioners (the non-moving parties) as it admits that the contents of the July 1983 meetings are in dispute and Petitioners were never simply and directly offered employment by the purchaser. The Petitioners' evidence, which must be taken as true and cannot be weighed, showed that the Respondents' stated in the July 1983 meetings,

that Petitioners (and others similarly situated) would not receive severance because they were being offered jobs. Petitioners evidence clearly shows that they were carefully offered not jobs but a "deal" to purchase their retail plants.

The lower Courts erred in granting summary judgment in favor of Amoco in applying the incorrect standards of law, they failed to identify all the material facts. The Seventh Circuit found there was no fiduciary duty in implementing, altering, or abolishing a benefit plan. *Young et al v. Standard Oil (Indiana) et al,* 849 F.2d 1039 (7th Cir. 1988) A.36 even though Amoco's severance policy was based on years in service and Respondents were embarking on the very path, selli ; the F&P, that would cause the severance to be payable under the prior policy(s). Petitioners also presented facts where it could be inferred that severance was paid by Respondent in the past under similar circumstances.[13] The lower Court also stated that Respondents were free to create a new "Special F&P Severance Plan" without notifying Petitioners and even though Respondents admit there are notice requirements contained in ERISA. The Seventh Circuit simply dismissed the importance of ERISA's notice requirements. That Petitioner Young was refused information on severance and that Petitioners were not given the text of the severance policy(s) prior to the changes or notified that *changes* were made, are among numerous other findings and inferences therefrom that must be made in favor of Petitioners.

Several Courts have found that a change in a welfare benefit policy on the eve of entitlement without proper notice and information, contrary to past practices, and without adequate

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[13] Petitioners presented evidence where severance was paid to former LP employees of Respondents when the Respondents' LP business was sold to Carpenter. The LP employees had substantially the same job duties with Carpenter as with Respondents and were not asked to purchase plants. The lower Courts simply failed to find this fact despite evidence presented in Petitioners' Appendix filed in the District Court.

representation and bargaining power on the part of the employees to be a violation of ERISA and in contradiction to the entire spirit of ERISA and all principles of equity, justice and the common law.[14]

This Court has accepted certiorari in the case of *Firestone*. The Third Circuit in *Bruch* reviewed the Congressional intent upon the passage of ERISA and showed through the history of the arbitrary and capricious test (as applied in the instant case by the Seventh Circuit) to be contrary to the intent of Congress

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[14] It is obvious that the Circuits are in disagreement. As argued at other points in this Petition, Petitioners submit that a plan administrator's (especially when the plan administrator and the employer are one and the same entity) decision cannot rest solely on his reading the "current" plan in front of him to see if his decision was arbitrary and capricious. If good faith, trust law, contract theories, or estoppel lie under ERISA or this Court decides in *Bruch* that the arbitrary and capricious test is *totally* the incorrect standard then further factors become material in rendering summary judgment and the lower Court's findings must include these other *material* facts under the accepted principals of summary judgment or more fairly, a trial on the merits. The following Courts have found the arbitrary and capricious test strictly applied to not be the proper standard of review and have reviewed other factors and facts: *Accardi v. Control Data Corp.*, 658 F.Supp. 881 (S.D.N.Y. 1987); *Adcock, supra;* (see also opinion in *Adcock v. Firestone Tire & Rubber Co.*, 616 F.Supp. 409 (D.C.Tenn. 1985); *Anderson v. Ciba-Geigy Corporation*, 759 F.2d 1518 (11th Cir. 1985); *Blau, supra; Calhoun, supra; Cattlin v. General Motors Corp.*, 641 F.Supp. 591 (E.D.Mich. 1986); *Deak v. Masters, Mates, and Pilots Pension Plan*, 821 F.2d 572 (11th Cir. 1987); *De Angelis v. Warner Lambert Co.*, 641 F.Supp. 467 (S.D.N.Y. 1986); *Dependahl, supra; Kaszuk, supra; Nivision v. Burney*, 228 Cal. Rptr. 106 (Cal. App. 2 Dist. 1986); *Pabst Brewing v. Anger*, 610 F.Supp. 214 (D.C. Minn. 1985); *Petrella, supra;* and *Scott, supra.*

and patently unfair when the bargaining power between employer and employee is unequal.[15]

The lower Courts erred in finding that Petitioners were offered jobs. Further, the lower Court failed to find *all* material facts as required under the proper standard of review for summary judgment. Numerous facts presented by the Petitioners beyond a "job offer" and on other acts by the Respondent are not only material, but crutial to the review of this case and its outcome. The complex case should be remanded so that facts may be found pursuant to this Court's standards of summary judgment or for a trial on the merits consistent with the proper standard of review for ERISA welfare benefits.

IV. Did The Lower Courts Err In Ignoring The Intent Of Congress In Passing ERISA And Emasculate ERISA By Making The Law More Restrictive Than Prior To The Passage Of ERISA By Eliminating The Remedies Available Pursuant To State Law, Federal Common Law, And The Law Of Contracts?

Prior to the passage of ERISA, the law regulating pension and welfare benefit plans was in chaos. Each state had different, and often inadequate, schemes of enforcement by statute or common law, primarily based in contract. There was no vesting, there was self-dealing, fiscal irresponsibility and generally no protection for the plan participant who suffered at the whim of their employer. *United States v. Tolkow,* 532 F.2d 853 (CA 2 NY 1976); 92 BNA LRRM 3027; 34 ALR FED 846;

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[15] Petitioners have argued in the lower Courts that standards set forth in union cases were inapplicable to their facts as Petitioners were non-union salaried employees and the principle that union and employer are of equal strength and must negotiate fairly and equitable simply does not fit the facts of the instant case. Petitioners obviously are not equal in bargaining position to Amoco Oil Company and had no input in determining their benefits other than accepting the benefits offered by Amoco by their continued performance of their job duties.

Connell v. United States Steel Corp., 516 F.2d 401 (CA5 Ala. 1975); 89 BNA LRRM 3089, 77 CCH LC ¶11019; and *Re: C.D. Moyer Co. Trust Fund*, 441 F.Supp. 1128 (E.D. Pa. 1977). ERISA was enacted for the purpose of creating one body of law to pre-empt the chaos of enforcement by the states and create uniformity and integrity to both pension and welfare benefit plans. *See* generally 29 U.S.C. §1001(a) and (b). The major goal of ERISA was to create an informed workforce who could enforce their rights through the existence of strict employee disclosure requirements and meaningful claims procedures without recourse to lengthy litation.[16]

The first brick in the foundation of ERISA fell out when the Courts began differentiating between procedural as opposed to substantive violations of ERISA. In *Wolfe v. J.C. Penney*, 710 F.2d 388 (7th Cir. 1983), the Court found that procedural (disclosure) violations never give rise to substantive violations of ERISA subject to redress. The *Blau* Court asserted that procedural violations were substantive violations. Since then, the various circuits have played with the issue. The treatment of this issue in the case before the Court has taken us full circle back to the *Wolfe* case. Amoco made no attempt to comply with the ERISA requirements of disclosure; nor, according to the Seventh Circuit, must they.

The next brick to fall out of ERISA's foundation was the funded versus unfunded benefits issue with unfunded benefits

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[16] Disclosure has been seen as a device to impart to employees sufficient information and data to enable them to know whether the plan was ... being administered as intended. It was expected that the information disclosed would enable employees to police their plans. H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649; 29 U.S.C. §§1021-1031; 29 U.S.C. §§1101-1114; 29 U.S.C. §1133.

being accorded second class citizenship. The Seventh Circuit in the instant case makes that painfully clear.[17]

This is not to say that employers may never change their unfunded or unvested benefit plans. It only says that changes must be properly disclosed and not made retroactive as they were in this case. *Dockray, supra; Baker, supra,* citing with favor *Argo, supra* at 513. Amoco's behaviour, as blessed by the District and Circuit Courts is as inequitable as one can find and probably a breach of the Petitioners' employment contract. But these are State Court remedies and therefore unavailable to the Petitioners according to the Seventh Circuit.

This kind of treatment of welfare benefits was not the intent of Congress. To continue this treatment can only emasculate the validity of unfunded welfare benefit plans without remedy as Federal jurisdiction has swept the field of State Court remedies. The equitable nature of ERISA as set forth in 29 U.S.C. §1132(a) A.113, and §1001 A.43, is dead according to the Seventh Circuit, and fiduciary responsibility following quickly. According to the Seventh Circuit, it appears that federal common law principles are not to be applied either. Why administer a plan if you can change it and unilaterally mold it to the employer's desires. Is that protection of the workers rights in their respective welfare benefit plans? Certainly, this Court must restore integrity to ERISA by halting its emasculation through the circuit courts' application of the arbitrary and capricious test with a total lack of even the barest hint of good faith, by reversing the decision of the Seventh Circuit.

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[17] See also *Holland v. Burlington Industries., Inc.,* 772 F.2d 1140 (4th Cir. 1985), aff'd 91 L.Ed 2d 559 (1986), *cert. denied,* 91 L.Ed. 2d 562 (1986).

CONCLUSION

The Court should grant the Petitioners' Petition for Writ of Certiorari as this case presents a different and more compelling set of facts on certain issues that this Court has agreed to hear by granting the Petition for Writ of Certiorari in *The Firestone Tire & Rubber Company, et al v. Bruch, et al,* Dkt. 87-1054. The importance of employers' fair implementation and administration of welfare benefits to employees is crucial and Congress recognized the need of employees in passing ERISA. There is great confusion between the Circuits in what standard of review to apply to welfare benefits and just what facts are important to their decisions. The Seventh Circuit decision in this case is in clear conflict with the intent set forth by Congress in the opening section of ERISA. Confusion will continue to reign until this Court clarifies the issues and the standard of review. The Court should grant this Petition and reverse the judgment of the Court below to insure uniformity among the circuits and that the Congressional intent concerning protection of employees from unfair practices of employers concerning welfare benefits is carried out by the Courts. In the alternative, certiorari should not be denied to these Petitioners by this Court, causing Petitioners' cause to be moot, without, at minimum, a remand to the lower Court with the benefit of this Court's decision in *Firestone.*

Respectfully submitted,

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September 21, 1988

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APPENDIX A

Philip A. Young, et al.,

v.

Standard Oil (Indiana),
Amoco Oil Company.

No. IP 83-1751-C.

United States District Court,
S.D. Indiana,
Indianapolis Division.

April 27, 1987.

Employees brought action against former employer and parent corporation to challenge denial of severance pay after division in which employees were working was sold. Employer and parent moved for summary judgment. The District Court, Steckler, J., held that: (1) employer did not breach fiduciary duty when it amended severance policy more than a year before termination of employment; (2) employees did not have equitable or contractual right to severance benefits; and (3) employees could not challenge as arbitrary and capricious provision of severance policy, which denied severance pay to employee who was offered job by purchaser of facility after divestitute.

Motion granted.

ORDER

STECKLER, District Judge.

This matter is before the Court upon the defendants' motion for summary judgment pursuant to Fed.R.Civ.P. 56. This rule states, in part, that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and af-

> fidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed.R.Civ.P. 56(c). In ruling on a summary judgment motion, the district court must examine the evidnece in the light most favorable to the nonmoving party by drawing all reasonable inferences in favor of that party. *See United States Shoe Corp. v. Hackett,* 793 F.2d 161, 166 (7th Cir.1986); *Black v. Henry Pratt Co.,* 778 F.2d 1278, 1281 (7th Cir.1985). The Court heard arguments on defendants' motion on April 16, 1987. The Court, having examined the motion, the memorandums of law, the affidavits and other exhibits, now finds there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law. The Court now enters the following findings of fact and conclusions of law.

Findings of Fact

1. The nine named plaintiffs are former employees of the defendant Amoco Oil Company ("Amoco"). The plaintiffs were employed in the portion of Amoco's Fertilizer & Pesticides Division ("F & P Division") that was sold to The Cropmate Company ("Cropmate") in 1983. At all material times, Amoco was a wholly-owned subsidiary of defendant Standard Oil Company (Indiana) ("Standard").

2. For a number of years prior to 1983, Amoco owned and operated the F & P Division, which was responsible for raw materials acquisition, manufacture, primary distribution, terminaling, marketing and farm delivery and application of fluid agricultural fertilizers and crop protection materials. The Division had facilities in fourteen states although the bulk of these were in the Midwest. Included in the Division were more than 350 retail fertilizer outlets, fourteen fertilizer processing (mix) plants, six ammonia terminals, four soil laboratories, Torch Chemical (which operated a manufacturing/formulation plant producing specialty fertilizer additives and agricultural pesticides) and over 800 employees.

3. The retail outlets in the F & P Division were organized into three districts as follows:

District	State	Number of Outlets
East	Wisconsin	11
	Illinois	87
	Indiana	38
	Ohio	20
	Michigan	6
West	Minnesota	32
	Iowa	91
	Missouri	28
	Kansas	1
	Nebraska	3
South	Georgia	36
	Florida	1
	Alabama	1
	Louisiana	1
		356

4. Each of the retail outlets was employee called a "helper" or "second-managed by one F & P Employee called the "crop guide manager." A number of these retail outlets also had a second full-time employee called a "helper" or "second-man." The named plaintiffs in this action were each employed in the retail outlets as follows:

Plaintiff	Position	Location
Philip A. Young	Crop Guide Manager	Markelville, IN
Max Gossard	Crop Guide Manager	Sheridan, IN
Robert L. Broeker	Crop Guide Manager	Sheridan, IN
Mark Bokelman	Helper	Sandusky, IN
James Rohlf	Crop Guide Manager	Green Springs, OH
Oliver E. Moldestad	Crop Guide Manager	Delhi, MN
Larry Godejahn	Crop Guide Manager	Hector, MN
Emery Pistulka	Crop Guide Manager	Wabasso, MN
Arthur Reinsma	Crop Guide Manager	Slayton, MN

5. In 1982, Amoco decided to try to divest the F & P Division. Initially, Amoco wanted to sell the entire Division as an on-going concern, and the investment banking firm of Morgan Stanley & Co. was employed to seek a buyer for the business. However, following a lack of significant response to an offering memorandum that was provided to prospective purchasers, Morgan Stanley recommended on June 15, 1982, that Amoco proceed with any feasible divestment plans.

6. Thereafter, on June 24, 1982, an Amoco Vice President recommended that Amoco drop fertilizers and pesticides as a line of business and cease all domestic retail fertilizer and pesticide operations as soon as practical but not later than June 30, 1983. On July 19, 1982, Amoco's Management Committee considered and approved a proposal to divest the F & P Division and withdraw from the business. The proposal was (1) to sell the business as an entity if possible; (2) to sell the business in

pieces if sale as an entity was not possible; and (3) if sales were not possible, to shut down the operations. Standard's Management Committee approved the proposal on July 20, 1982.

7. Over a period of several years prior to 1981, Standard and its subsidiaries had implemented a number of different severance policies. Effective April 1, 1981, however, Standard had adopted the Severance Allowance Policy of Standard Oil Company and Participating Companies (the "1981 Severance Policy"). The 1981 Severance Policy provided that it would apply to a company "whose management elects to apply [it] to a particular employee-reduction situation," and that it could "be implemented for a particular employee-reduction situation for a limited period of time." The 1981 Severance Policy also conferred authority on management to designate categories of employees who would not be eligible to participate in situations where the Policy was otherwise implemented. The 1981 Severance Policy further provided that:

> 3. Even though the Policy may be in effect for a particular employee-reduction situation, an employee will not qualify for a severance allowance under the following circumstances:
>
> g. Sale of facilities when the new owner offers to the employee comparable employment as determined by the Company.

The 1981 Severance Policy was reported to the United States Department of Labor by letter dated November 3, 1981.

8. During 1982, when divestiture of the F & P Division was initially being considered, Amoco's management also began considering the possible implementation of the 1981 Severance Policy in connection with such a divestitute. Thereafter, in June 1982, after Amoco's management preliminarily decided to cease all F & P operations, the process for obtaining formal approval to implement severance under the 1981 Severance Policy

was begun. On July 13, 1982, management approval was granted to implement severance under the 1981 Severance Policy for all F & P Division employees, including the crop guide managers and other retail plant employees.

9. On August 2, 1982, however, after Standard's approval of the final Amoco proposal to diverst the F & P Division (which included selling and shutting down the Division in pieces if sale as an entity was not possible), L.D. Thomas, President of Amoco, sought permission from Standard to create a different severance policy to govern the F & P divestiture. Thomas's memorandum stated, *inter alia,* that:

> The Severance Allowance Policy currently in effect states that severance will not be payable if "the new owner offers to the employees comparable employment as determined by the company." Because of the nature of the fertilizer and pesticides business, it is unlikely that potential buyers would provide wages or the level of benefits comparable to those presently offered by Amoco Oil. Under these conditions, all present Fertilizer & Pesticides employees would probably qualify for severance benefits, regardless of employment opportunities with the new owners. Such payments would amount to approximately $6,200,000. In addition, it is conceivable that many different new owners will be involved, making it difficult to determine comparable employment and inviting possible litigation in the determination of comparable employment.
>
> Amoco Oil recommends that a special Severance Allowance Policy be adopted for the Fertilizer & Pesticides divestiture as follows:
>
> 1. Any present Amoco employee who is offered a position with a new owner will forfeit severance consideration, regardless of salary, benefits, or position.
>
> 2. Severance payments will be given to current employees who are not offered employment with the

new owner, and to employees when facilities are not sold and operations are discontinued.

3. Consent Retirement will be available to current employees with 20 or more years of Retirement Plan participation even if they do not qualify for a severance allowance.

10. Standard approved this recommendation to adopt a special severance policy for the divestiture of the F & P Division and confirmed this by letter dated August 6, 1982. Accordingly, the Severance Allowance Policy of the Fertilizer & Pesticides Division of Amoco Oil Company ("F & P Severance Policy") was created, effective August 1, 1982. It provides, *inter alia*, that:

> This policy applies to employees in the Fertilizer & Pesticides operations of Amoco Oil Company whose services are permanently terminated due to the discontinuance or sale of such operations.
>
> . . . .
>
> B. Qualifications—Severance Allowance
>
> 1. An employee will qualify for a severance allowance provided all of the following conditions are met:
>
> a. The employee becomes unemployed because:
>
> (1) The Company does not sell the facility and the operations are discontinued, or
>
> (2) The facility is sold by the Company but the buyer does not offer employment to the individual.
>
> . . . .
>
> 2. An employee will not qualify for a severance allowance under the following circumstances:
>
> a. Offered a job by the new owner of the facility.

The F & P Severance Policy was reported to the United States Department of Labor by letter dated February 24, 1984.

11. By letter dated August 3, 1982, addressed to all employees of the Division, Amoco confirmed a potential sale of the Division and stated the qualification for entitlement to severance pay:

> Amoco Oil Company will announce publicly tomorrow that it plans to offer for sale its entire fertilizer and pesticides marketing and supply system....
>
> Amoco has explored sale of the entire fertilizer and pesticide system with several large companies and currently has negotiations underway with interested parties. Barring sale of the system as a whole, Amoco plans to sell the system in regional segments, possibly to regional companies with growth plans. . . .
>
> If the system is sold as a whole or in regional segment, current employees may be offered employment by the purchaser. Should such sales not occur or employees are not offered employment by the new owners, Amoco will provide severance and if eligible, retirement benefits to regular full-time employees who must leave the company.

12. Amoco also distributed to its employees a press release, dated August 4, 1982, which also described the divestiture and the conditions under which severance benefits would be paid. The press release stated in part: "Amoco will provide severance and appropriate retirement benefits to regular, full-time employees who are not offered employment by the new owners and must leave the company because of the sale."

13. In addition, in August 1982, the Division employees were provided copies of "Questions and Answers About Fertilizer and Pesticides Sale." The document stated, *inter alia:*

> 3. Does this mean that the Fertilizer & Pesticides facilities will be shut down? Answer: Finding a

suitable purchaser for a business this large requires a lot of time and effort. Active, profitable fertilizer and pesticides operations will not be shut down at this time. Ultimately, we plan to get out of the business.

. . . .

6. Should a purchaser for the system, or parts of it, be found and the purchaser offered Amoco Oil employees jobs, would Amoco Oil provide the regular full-time employees with severance?
Answer: If a purchaser is found and elects to hire Amoco Oil's current regular, full-time employees, they would not be eligible for severance pay.

7. If I reject a job offer from the new owner, will I forfeit my severance benefits?
Answer: Yes. Severance benefits will be available only to regular, full-time employees who are not offered a job.

14. The plaintiffs each received copies of one or more of the aforementioned documents, and each of them received a copy of the aforementioned "Questions and Answers."

15. After further efforts to sell the F & P Division as an entity were unsuccessful, Amoco began selling and shutting down the Division in regional segments. In early 1983, Amoco (1) sold the mix plant in Rochelle, Georgia, to Chemical Enterprises, Inc., and sold or shut down the retail plants in Georgia; (2) sold the Brunswick, Missouri, mix plant and all retail plants in Missouri and Kansas to SCF, Inc.; and (3) sold the mix plant at Mt. Carmel, Illinois, and the retail plants served by that facility (thirteen in Illinois and seven in Indiana) to Triple T, Inc. Lawsuits seeking severance benefits were brought against Amoco arising out of the same F & P Severance Policy and the plant sales in Rochelle, Georgia and Mt. Carmel, Illinois. These lawsuits were adjudicated on the merits and in favor of Amoco.

Hall v. Amoco Oil Company, CA No. 83-40-Amer (N.D. Ga.1985); *Wills v. Amoco Oil Co.,* CV No. 84-4434 (S.D.Ill. 1985) [Available on WESTLAW, DCT database].

16. Amoco thereafter received an offer for the remainder of the F & P Division from the Scoular Company. Scoular's offer said, *inter alia,* that:

> Most of the retail outlets will be offered for sale to the present AMOCO plant managers at 82.5% of net book value. The retail outlets will be leased back under long term agreements.
> Most of AMOCO's employees, including the owner-manager of the leased retail outlets, will be offered comparable jobs.

By letter to Scoular dated May 13, 1983, Amoco confirmed a tentative agreement to sell the remainder of the F & P Division to Scoular. Amoco told the F & P employees of the tentative sale to Scoular by letter dated May 19, 1983.

17. The final Agreement for Sale and PUrchase of Assets was made as of June 15, 1983, between Amoco Oil Company, as Seller, The Cropmate Company (a subsidiary created by Scoular), as Buyer, and The Scoular Company. The Agreement provided for the purchase by Cropmate of all of the remaining assets used by Amoco for the F & P business. The Agreement further provided that:

3.4 *Employees of Seller*

> (a) ... Buyer agrees to offer employment prior to closing (August 31, 1983) to each employee of Seller listed in Exhibit "U" upon the following terms and conditions: pre-employment physical examinations shall be waived and substantially equivalent employee salaries will begin as of the closing. Exhibit "U" shall be completed by Buyer prior to July 20, 1983.

(b) Buyer shall recognize prior service with Seller for vesting of those employees listed on Exhibit "U" who participate in Buyer's profit sharing plan.

18. By letter dated June 20, 1983, Amoco told the remaining F & P employees of the sale to Cropmate and stated, *inter alia,* that:

> The agreement stipulates that the effective date of employment for those employees who are offered and accept employment with The Cropmate Company will be September 1, 1983.
>
> . . . .
>
> Please contact your immediate supervisor if you have questions regarding the transition. Questions concerning your Amoco Oil benefits should be directed to Lucy Wilcox (312) 789-4934 or Sharon Zorn (312) 789-4966.

This letter was sent to the plaintiffs.

19. Scoular's intention, as communicated to Amoco in its offer-to-purchase letter, was that jobs would be offered to most of the F & P employees, and that most crop guide managers would also be encouraged to purchase from and lease back to Cropmate the retail outlets where they were employed. After the sale agreement between Amoco, Scoular and Cropmate was made, Cropmate began reviewing the current crop guide managers to determine which ones Cropmate wanted to become part of the new organization. Those current crop guide managers and certain current helpers that Cropmate wanted to become crop guide managers for Cropmate were invited to meetings during July 1983. Each of the named plaintiffs attended such a meeting between July 11 and July 17, 1983. There are disputed factual issues regarding what was said at these meetings about employment with Cropmate and Cropmate's proposal tha crop guide managers purchase from and lease back to Cropmate their retail outlets, and whether these proposed

transactions would be beneficial to the plaintiffs. However, the following facts are undisputed:

(a) Pursuant to the sale agreement, Cropmate provided to Amoco a list of current employees to whom Cropmate would offer jobs. Each of the nine plaintiffs was named on that list.

(b) Eight of the nine plaintiffs were in fact employed by Cropmate beginning the day after the sale was closed, each in the same job and at the same salary.

(c) Cropmate twice told Amoco after the sale closing that the remaining plaintiff (Moldestad) had been offered and had refused a job with Cropmate.

20. Later in July 1983, Amoco held benefit meetings with the F & P employees. Each of the named plaintiffs attended one of these meetings. At these meetings, the F & P employees were again told that an employee who was offered a job by the purchaser would not be eligible for severance pay. The employees were also told how the amount of severance would be computed for eligible employees.

21. The closing of the sale between Amoco, Scoular, and Cropmate was held on August 31, 1983, and the sale was effective at 12:01 a.m. on September 1, 1983. All of the plaintiffs except Moldestad became employees of Cropmate on September 1, 1983, in the same positions and at the same salary.

22. As of the dates of their depositions in this acon, six of the plaintiffs were still employed by Cropmate. These were:

Plaintiff	**Date of Deposition**
Bokelman	2/22/84
Godejahn	4/03/85
Gossard	2/23/84
Pistulka	4/02/85
Reinsma	4/02/85
Rohlf	3/08/85

23. On August 31, 1983, plaintiff Young notified Cropmate that he would work for Cropmate only until September 16, 1983. Young quit on that day and accepted a position with Terra Chemicals. He was paid by Cropmate for these two weeks.

24. Plaintiff Broeker remained employed by Cropmate until January 29, 1984. He testified at his deposition that he left when Cropmate found a potential manager-buyer for his retail plant, and that he began farming full time.

25. After they began employment with Cropmate, three of the plaintiffs purchased their retail plants from and leased them back to Cropmate. These were:

Plaintiff	**Date of Purchase & Lease**
Rohlf	November 1983
Reinsma	February 1984
Godejahn	April 1984

26. Cropmate terminated no one who did not want to buy a plant as of September 1, 1983. However, crop guide managers who did not buy their plants were at risk that Cropmate would later sell the plant to another buyer who would decide not to retain the existing manager.

27. Amoco employees were periodically sent booklets which detailed and explained their employee benefits. These benefit booklets do not mention severance benefits. However, they do describe the procedure and address for filing a benefit claim with Amoco. In addition, by letter dated July 14, 1983, the F & P employees were provided a booklet summarizing their benefits upon termination of their employment. These booklets did not say anything about severance. However, they do state that:

After your termination, you should direct all benefit plan questions to:

Personnel Records Center
Standard Oil Company (Indiana)
Post Office Box 5738
Chicago, Illinois 60680

In addition, on June 20, 1983, Amoco's Manager for Employee Relations sent a letter to all F & P employees stating: "Questions concerning your Amoco Oil benefits should be directed to Lucy Wilcox (312) 789-4934 or Sharon Zorn (312) 789-4966."

28. Plaintiff Rohlf's notes of a July 19, 1983, meeting with attorneys Decker and Lawyer (plaintiffs' counsel in this aciton) state, *inter alia:* "Write Amoco Oil a letter and demand severance."

29. During July 1983, attorneys Decker and Lawyer wrote leeters to Amoco claiming severance on behalf of plaintiffs Gossard, Young, and Bokelman.

30. On November 9, 1983, attorney Rowley wrote letters to Amoco claiming severance, *inter alia,* on behalf of plaintiffs Godejahn, Moldestad, Pistulka, and Reinsma.

31. On March 30, 1984, attorney Nordholt wrote to Amoco claiming severance, *inter alia,* on behalf of plaintiff Rohlf.

32. The one plaintiff who did not file a claim for severance with Amoco (Broeker) has been a named plaintiff in this action since it was originally filed on October 11, 1983. At least since that time, he has been represented by attorneys Decker and Lawyer, the same attorneys who wrote claim letters to Amoco on behalf of plaintiffs Young, Gossard and Bokelman during July, 1983.

33. The list that Scoular provided to Amoco pursuant to the Sale Agreement had listed the Amoco F & P employees who would be offered jobs by Cropmate. Each of the plaintiffs was

named on that list. After the sale of the F & P Division was consummated, Sharon Zorn of Amoco contacted Cropmate on September 8, 1983, to verify the employment of former Amoco F & P employees. She was told by Cropmate that several former Amoco employees, including plaintiff Moldestad, had been offered a job with Cropmate and had rejected the offer. She was further told by Cropmate, *inter alia,* that the other named plaintiffs had been employed by Cropmate.

34. On October 12, 1983, Amoco responded to the claim letters from counsel for plaintiffs Young, Gossard, and Bokelman. Amoco's letter denied the claims, explained why the claims were denied, enclosed a copy of the F & P Severance Policy, and explained that further information could be submitted by the claimants and how the denial could be appealed. No further information was submitted by these claimants and no administrative appeals were filed on their behalf.

35. On December 7, 1983, Amoco responded to the November 9, 1983, claim letters from counsel for plaintiffs Molestad, Pistulka, Godejahn, and Reinsma. Amoco's letter denied the claims, explained why the claims were denied, enclosed a copy of the F & P Severance Policy, and explained that further information could be submitted by the claimants and how the denial could be appealed.

36. By letters dated January 12, 1984, counsel for plaintiffs Reinsma, Pistulka, Moldestad, and Godejahn appealed the decisions denying severance pay. No additional information was submitted by the claimants in these appeals. After receiving these appeals, Amoco wrote to Cropmate on February 29, 1984, to verify that Cropmate did, in fact, offer employment to these former Amoco employees. Cropmate responded by letter of March 6, 1984, reporting, *inter alia,* that:

> Oliver E. Moldestad dtermined he did not want to be offered a job and left the company prior to the Cropmate takeover. The remaining names on the list were offered a job and are still on our payroll.

37. Thereafter, by letters dated March 20, 1984, R.K. Boknecht of Standard denied these plaintiffs' appeals. His letters stated:

> Your letter of January 12, 1984, has been referred to me as fiduciary for review of denied claims under the Severance Allowance Policy—Fertilizer and Pesticides Division ("Policy"). The Policy, effective August 1, 1982, was adopted to apply to the sale or discontinuance of the Fertilizer and Pesticides Division of Amoco Oil Company. Under the terms of the Policy, a copy of which was given to you with Mr. Mack's letter of December 7, 1983, no one is entitled to severance pay who is offered a job by the purchaser of his or her facility. Before the closing of the sale, the Cropmate Company advised Amoco Oil Company of those employees who would and would not be offered a job. [Godejahn-Moldestad-Pistulka-Reinsma were] among those to be offered a job, and [their] claim for severance was denied pursuant to Section B.1a and B.2a of the Policy.
>
> When I received your letter of January 12, 1984, I asked Mr. Mack to verify with The Cropmate Company that it did offer [Godejahn-Moldestad-Pistulka-Reinsma] a job commencing September 1, 1983. On March 6, 1984, the Cropmate Company confirmed that [Godejahn-Moldestad-Pistulka-Reinsma were] offered a job. Therefore, [the] claim for severance pay is denied.

38. On April 18, 1984, Amoco responded to the March 30, 1984, claim letter from counsel for plaintiff Rohlf. Amoco's letter denied the claim, explained why the claim was denied, enclosed a copy of the F & P Severance Policy, and stated that further information could be submitted and how the denial could be appealed. No further information was submitted and the denial was not appealed.

Conclusions of Law

Based on the foregoing findings of fact, the court now makes the following conclusions of law.

[1] 1. Severance benefits are employee benefits covered by the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1002(1), 1002(2)(B)(i); 29 C.F.R. §§ 2510.3-1(a)(3), 2510.3-2(b); *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1144-46 (4th Cir.1985), *aff'd*, ____ U.S. ____, 106 S.Ct. 3267, 91 L.Ed.2d 559 (1986); *Pinto v. Zenith Radio Corp., 480 F.Supp. 361 (N.D.Ill. 1979), aff'd*, 618 F.2d 110 (7th Cir.1980).

2. ERISA provides a cause of action for a plan participant or beneficiary "to recover benefits due to him under the terms of his plan [or] to enforce his rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). This Court has jurisdiction of this action pursuant to 29 U.S.C. § 1132(e)(1).

[2] 3. Plaintiffs plead a number of state common law claims for severance benefits (breach of contract, unjust enrichment and negligence). With certain exceptions irrelevant here, however, ERISA preempts "all State laws insofar as they ... relate to any employee benefit plan," "directly or indirectly." 29 U.S.C. § 1144(a), (c); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Plaintiffs' state law claims seeking to recover severance benefits are preempted by ERISA. *See, e.g., Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1146-48 (4th Cir.1985), *aff'd*, ____ U.S. ____, 106 S.Ct. 3267, 91 L.Ed.2d 559 (1986); *Jung v. FMC Corp.*, 775 F.2d 708, 714 (9th Cir.1985); *Pabst Brewing Co. v. Anger*, 610 F.Supp. 214, 216 (D.Minn. 1985), *aff'd*, 784 F.2d 338 (8th Cir.1986).

4. Plaintiffs' primary claims in this action are that defendants acted wrongfully in creating the F & P Severance Policy in

place of the 1981 Severance Policy in place of the 1981 Severance Policy to govern the F & P Division divestiture. The F & P Severance Policy provides that severance would not be paid to any employee who was "offered a job by the new owner of the facility," whereas the 1981 Severance Policy provides that severance would not be paid "when the new owner offers ... *comparable* employment as determined by" Standard or its subsidiary (in this case, Amoco). At the same time, however, the F & P Severance Policy guaranteed severance to any F & P employee who was not offered a job by a purchaser, whereas severance under the 1981 Severance Policy is dependent upon (1) a management decision to implement severance in a particular employee-reduction situation, and (2) a management decision to include particular categories of employees in circumstances where the Policy was implemented. Nevertheless, plaintiffs allege that the decision to create the F & P Severance Policy constituted a breach of fiduciary duty under the 1981 Severance Policy and illegal discrimination under ERISA.

[3, 4] 5. ERISA divides employee benefit plans into two categories: (1) retirement or pension plans; and (2) welfare benefit plans. Both the 1981 Severance Policy and the F & P Severance Policy are welfare benefit plans and not retirement plans under ERISA. 29 C.F.R. § 2510.3-2(a)-(b), promulgated pursuant to 29 U.S.C. § 1002(2)(B)(i). ERISA imposes requirements for the accrual, vesting and nonforfeitability of most benefits under retirement plans, as well as for the funding of such plans. 29 U.S.C. §§ 1051-61, 1081-86. However, these accrual, vesting, nonforfeitability and funding requirements are not applicable to welfare benefit plans. 29 U.S.C. §§ 1051, 1081(a)(1). Accordingly, an employee's inchoate "interest" in welfare benefits may be terminated if his employment is terminated or if the benefit plan is amended or abolished before he becomes eligible for benefits under the terms of the existing plan. *See Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406, 410 (4th Cir.1983), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984).

6. The uncontested facts show that plaintiffs were not entitled to payment of severance benefits under the 1981 Severance Policy at the time the F & P Severance Policy was created, in August 1982, and more than a year before their Amoco employment was terminated. Acceptance of plaintiffs' claims that defendants acted wrongfully in creating a new severance policy to govern the divestitute would mean that welfare benefit plans the accrual, vesting and nonforfeitability requirements that Congress determined to establish only for retirement benefit plans.

[5] 7. It has been specifically held that an employer does not act in a fiduciary capacity or breach a fiduciary duty in amending a severance plan in a sale-of-business context to avoid payment of severance benefits to employees who continue to work for the purchaser. *Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406 (4th Cir.1983), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984). That decision has been followed in other cases holding that an employer does not act in a fiduciary capacity in amending benefit plans with respect to nonaccrued and nonvested benefits. *See, e.g., Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir.1986); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1268-69 (7th Cir.1985); *United Independent Flight Officers, Inc. v. United Airlines, Inc.*, 756 F.2d 1274, 1280 (7th Cir.1985); *Bencivenga v. Western Pennsylvania Teamsters and Employers Pension Fund*, 763 F.2d 574, 577-78 (3d Cir.1985). Accordingly, plaintiffs' claims that defendants breached a fiduciary duty in creating the F & P Severance Policy to govern the divestiture fail as a matter of law.

[6] 8. Plaintiffs allege that they have a contractual or equitable interest in severance benefits that is enforceable under federal common law. However, "[t]he deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement

remedies were intended to be exclusive." *Pilot Life Insurance Co. v. Dedeaux,* ____ U.S. ____, ____, 107 S.Ct. 1549, 1556-1557, 95 L.Ed.2d 39 (1987). Moreover, the Seventh Circuit Court of Appeals has indicated that severance pay plans are not to be treated as contracts, but rather as employee welfare benefit plans under ERISA. *Sly v. P.R. Mallory & Co.,* 712 F.2d 1209, 1213 (7th Cir.1983). Additionally, even if the severance pay plans are treated as contracts, the 1981 Severance Policy states that "the company reserves the right to amend, modify, suspend or discontinue the Policy, and any such action shall apply to existing as well as future employees...." Thus the plaintiffs have no right to severance benefits under either equity or the law of contracts.

[7] 9. Plaintiffs have no claim for "discrimination" under ERISA. The pertinent statutory section is an anti-retaliation provision—it makes it unlawful "to discharge, fine, suspend, expel, discipline, or discriminate against" an employee "for exercising any right to which he is entitled" under a benefit plan or "for the purpose of interferring with the attainment of any right to which [he] may become entitled" under a benefit plan. 29 U.S.C. § 1140. This section is modeled upon § 8(a)(3) of the National Labor Relations Act and "discrimina[tion]" thereunder means adverse treatment of an employee amounting to a "constructive discharge." *See, e.g., West v. Butler,* 621 F.2d 240, 245 (6th Cir.1980); *Goins v. Teamsters Local 639,* 598 F.Supp. 1151, 1154 (D.D.C.1984). Under the uncontested facts here, there was no "discrimination" against plaintiffs in the nature of a "constructive discharge."

[8] 10. Plaintiffs further allege that the "job offer" condition for severance under the F & P Severance Policy is "arbitrary and capricious" because their jobs with Cropmate were or are insecure unless they agreed to purchase from and lease back to Cropmate the retail outlets where they were employed. However, it is settled law under ERISA that plaintiffs may not challenge the substantive terms of a benefit plan as "arbitrary

and capricious," and that a court may not redraw a plan's eligibility criteria to provide benefits to employees based on claims that this would better accomplish the "purpose" of the benefit plan or avoid harshness caused by application of an eligibility rule to individual circumstances. *See Moore v. Reynolds Metals Co. Retirement Program,* 740 F.2d 454 (6th Cir.1984), *cert. denied,* 469 U.S. 1109, 105 S.Ct. 786, 83 L.Ed.2d 780 (1985). Thus, in another suit against Amoco seeking severance benefits under the same F & P Severance Policy, the court held that it could not award severance to employees who had been offered jobs with the purchaser, notwithstanding that one employee's job lasted only two weeks and another employee's job lasted only one week. *Wills v. Amoco Oil Co.,* CV 83-4222 and 84-4434 (S.D.Ill., Sept. 17, 1985)[Available on WESTLAW, DCT database].

[9] 11. Plaintiffs further allege that defendants committed procedural violations of ERISA in not describing severance benefits in summary plan descriptions provided to them. However, the uncontested facts are that Amoco repeatedly disclosed to the plaintiffs the "job offer" limitation on eligibility for severance under the F & P Severance Policy promptly after the Policy was created and that plaintiffs were aware of it. It is also uncontested that Amoco disclosed the procedure for filing a claim for benefits. Accordingly, any procedural ERISA violations that occurred caused no prejudice or injury to plaintiffs' substantive rights under the benefit plan. It has been held that procedural ERISA violations do not create an entitlement to severance benefits. *See, e.g., Anderson v. Ciba-Geigy Corp.,* 759 F.2d 1518, 1521-23 (11th Cir.), *cert. denied,* ____ U.S. ____, 106 S.Ct. 410, 88 L.Ed.2d 360 (1985); *Sly v. P.R. Mallory & Co.,* 712 F.2d 1209, 1211-13 (7th Cir. 1983). These cases held in the presence of procedural ERISA violations that the employers did not act "arbitrarily and capriciously" in interpreting severance plans to deny benefits to employees who went to work for the purchasers of facilities, notwithstanding that no such eligibility condition was stated in the plans themselves. By

contrast, the "Job offer" rule here is expressly stated in the F & P Policy. Thus, another court has held in another suit against Amoco arising out of the same F & P severanc epolicy and substantially identical facts that the plaintiffs were not entitled to severance benefits contrary to the terms of the Policy on the basis of any procedural ERISA violations. *Hall v. Amoco Oil Co.,* CA No. 83-40-Amer (M.D. Ga., August 30, 1985).

12. Under ERISA's "arbitrary and capricious" standard for judicial review of denial of benefit claims, a court may consider whether the plan administrator's decision was supported by the terms of the plan. Nevertheless, the court is deferential to the administrator's interpretation of the plan, and will uphold it if it has a "rational basis" given the language of the plan. *See, e.g., Martinez v. Swift & Co.,* 656 F.2d 262, 263-64 (7th Cir.1981); *Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan,* 698 F.2d 593, 601 (2d Cir.), *cert. denied,* 464 U.S. 829, 104 S.Ct. 105, 78 L.Ed.2d 108 (1983). However, no issue of plan "Interpretation" is presented here; the F & P SEverance Policy expressly provides that employees are not eligible for severance if they are "[o]ffered a job by the new owner of the facility."

13. Under ERISA's "arbitrary and capricious" standard, a reviewing court also considers whether there was "substantial evidence" to support the plan administrator's decision to deny the benefit claim. However, the court considers only the evidence in the record before the plan administrator, and "is not to hold a *de novo* factual hearing on the question of the applicant's eligibility." *Wardle v. Central States, Southeast and Southwest Areas Pension Fund,* 627 F.2d 820, 824 (7th Cir.1980), *cert. denied,* 449 U.S. 1112, 101 S.Ct. 922, 66 L.Ed.2d 841 (1981). Where the evidence before the plan administrator was simply in conflict concerning the applicant's entitlement to benefits, the plan administrator's decision will not be overturned. *See, e.g., Pokratz v. Jones Dairy Farm,* 771

F.2d 206, 209 (7th Cir.1985); *Torrence v. Chicago Tribune Co.*, 535 F.Supp. 743, 746 (N.D. Ill.1981). The standard is whether a rational person could have decided the issue the way the plan administrator did, not whether the decision was one that the court would make as an original matter. *Pokratz,* 771 F.2d at 209.

[10] 14. As shown by the undisputed facts, all of the evidence before the plan administrator was that eight of the nine plaintiffs were offered jobs by Cropmate and were in fact employed by Cropmate after the sale. These facts are confirmed by the plaintiffs' deposition testimony in this case. Accordingly, the decisions denying them severance cannot be found to be "arbitrary and capricious" under the F & P Severance Policy, which provides that severance will not be paid to employees who are offered jobs by a purchaser of their facilities.

15. Of the nine plaintiffs, only plaintiff Moldestad was not employed by Cropmate after the sale. However, the information from Cropmate before the plan administrator was that he had been offered a job. When Moldestad appealed the denial of severance claiming he was not offered a job, Amoco again contacted Cropmate and was again told he had been offered a job. Accordingly, there was substantial evidence in the record before the plan administrator to support the denial of benefits under the F & P Severance Policy, which provides that an employee will not qualifiy for severance if he is offered a job by the purchaser of the facility. Under the "arbitrary and capricious" standard of review, "[i]t is not proper function of the court to decide between two reasonable, but conflicting, interpretations of the facts presented." *Torrence v. Chicago Trubune Co.*, 535 F.Supp. 743, 746 (N.D.Ill.1981). *See also Pokratz v. Jones Dairy Farm,* 771 F.2d 206, 209 (7th Cir.1985). In another case involving the same F & P Severance Policy and substantially identical facts, the court held that the plan administrator's decision to deny severance was supported by substantial evidence and thus was not arbitrary or capricious. *Wills v. Amoco Oil*

Co., CV 83-4222 and 84-4434 (S.D.Ill. Sept. 17, 1985) [Available on WESTLAW, DCT database]. In this case as well, on the undisputed facts regarding the evidence before the plan administrator, the decision to deny plaintiff Moldestad severance benefits cannot be found to have been arbitrary or capricious.

16. At the request of defendants, the court may properly grant summary judgment for defendants without ruling on plaintiffs' motion to certify this action as a class action. *See, e.g., Wright v. Schock,* 742 F.2d 541 (9th Cir.1984); *Ahne v. Allis-Chalmers Corp.,* 102 F.R.D. 147 (E.D.Wis. 1984).

17. There is no genuine issue of material fact and defendants are entitled to summary judgment as a matter of law.

APPENDIX B

Philip A. Young, Max Gossard, Robert L. Broeker, Mark Bokelman, James Rohlf, Oliver E. Moldestad, Larry Godejahn, Emery Pistulka, and Arthur Reinsma, Plaintiffs-Appellants,

v.

Standard Oil (Indiana) and Amoco Oil Company, Defendants-Appellees.

No. 87-1866.

United States Court of Appeals, Seventh Circuit.

Argued Dec. 8, 1987.

Decided June 23, 1988.

Former employees of corporation brought class action suits under employment Retirement Income Security Act alleging that they were improperly denied severance benefits after portion of their division was acquired by purchaser. The United States District Court for the Southern District of Indiana, 660 F.Supp. 587, William E. Steckler, J., entered summary judgment in defendants' favor, and plaintiffs appealed. The Court of Appeals, Kanne, Circuit Judge, held that: (1) severance benefits were "welfare" benefits under ERISA which could be unilaterally amended or eliminated without consideration of employees' interests; (2) question of whether benefit determination was proper was to be reviewed under arbitrary and capricious standard, not more stringent "good faith" standard under which corporation's motives for implementing new severance plan would be subject to examination; and (3) where plaintiffs were offered employment with purchaser of portion of their division they were not entitled to benefits under plan and thus plan administrator's decision to deny plaintiffs' claims was rational.

Affirmed.

Lynne H. Lawyer, Decker & Lawyer, Anderson, Ind., for plaintiffs-appellants.

Stanley C. Fickle, Barnes & Thornburg, Indianapolis, Ind., for defendants-appellees.

Before BAUER, Chief Judge,
COFFEY, and KANNE, Circuit Judges.

KANNE, Circuit Judge.

In this action, governed by the Employee Retirement Income Security Act (ERISA), the district court granted defendants' motion for summary judgment finding that there was no factual dispute that plaintiffs' severance benefits claims were properly denied, 660 F.Supp. 587 (1987). Plaintiffs challenged both the terms of the severance plan, which they contended was developed secretly, and the employer's decision to deny them benefits. Because we believe the record supports the district court's determination that there was no dispute about plaintiffs' eligibility for benefits and because we find the employer did not owe a fiduciary duty to the employees in developing the severance plan, we affirm.

A.

Plaintiffs are former employees of defendant, Amoco Oil Company, a subsidiary of defendant, Standard Oil of Indiana, (collectively "Amoco"). Plaintiffs were employed in Amoco's Fertilizer and Pesticides Division ("F & P Division"), which manufactured and distributed agricultural fertilizers and crop protection materials. The division had 350 retail outlets, organized regionally into three divisions. Each retail outlet was managed by a crop guide manager and in some instances, by another employee called a "helper" or "secondman." Plain-

tiffs were all employed as crop guide managers with the exception of plaintiff Bokelman who was employed as a helper.

In late 1981, Amoco received a recommendation from its financial consultant to divest itself of the F & P Division. Amoco began searching for a buyer, but when no offers had been received by June, 1982, it was decided that the F & P division would be divested in any manner possible, including by sale of the division on a facility-by-facility basis or by cessation of operations.

At the time Amoco first considered divesting itself of the F & P Division, the 1981 Severance Allowance Policy of Standard Oil Company and Participating Companies (which included Amoco) was in effect. That policy provided that Amoco management could elect to "apply [the severance policy] to a particular employee-reduction situation." Management was free however, to exclude categories of employees from participation under the plan. In addition, the severance policy also contained an exclusion which read as follows:

> 3. Even though the Policy may be in effect for a particular employee reduction situation, an employee will not qualify for a severance allowance under the following circumstances:
>
> g. Sale of facilities when the new owner offers to the employee *comparable employment* as determined by the Company.

In June, 1982, Amoco management sought permission to include all F & P Division employees under the terms of the 1981 Severance Policy in the event a sale of the F & P Division was consummated. Management approval for this request was granted on July 13, 1982. Thus, under the terms of the 1981 policy, all employees of the F & P Division, who were offered a comparable position by the Division's buyer, were not entitled to severance benefits.

Shortly thereafter, it became evident that a sale of the F & P Division in its entirety was not possible and a suggestion was made to sell the division piecemeal. At the same time, in light of the high costs associated with applying the 1981 severance policy to the sale of the F & P division,[1] Amoco management suggested that a different severance policy be created for the F & P Division. In a memorandum to Standard, Amoco's president wrote:

> [I]t is unlikely that potential buyers would provide wages or the level of benefits comparable to those presently offered by Amoco Oil. Under these conditions, all present [F & P] employees would probably qualify for severance benefits, regardless of employment opportunities with the new owners. Such payments would amount to approximately $6,200,000.
>
> . . . . .
>
> Amoco recommends that a special severance ... policy be adopted for the [F & P] divestiture....
>
> 1. Any ... Amoco employee who is offered a position with a new owner will forfeit severance consideration, regardless of salary, benefits or position.
>
> 2. Severance payments will be given to current employees who are not offered employment with the new owner, and to employees when facilities are not sold and operations are discontinued.

The amended severance policy, as outlined in the president's memorandum, was approved on August 6, 1982, but was effective as of August 1, 1982.

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[1] Amoco determined that if the F & P Division were sold in its entirety, severance benefit payments could equal as much as $6.2 million.

On August 3, 1982, Amoco sent a letter to the F & P employees announcing its plans to sell the division. The letter made a perfunctory reference to the employees' severance benefits rights,[2] but did not mention that those rights had been made a part of a new policy. Thus, the employees were not made aware that they were now ineligible for benefits if they received *any* offer of employment from a potential purchaser rather than an offer of *comparable* employment, as previously set forth in the 1981 severance policy. Nor did a later press release or a "Question & Answer" brochure make this change clear.

Amoco began selling segments of the F & P Division to various buyers. On April 29, 1983, the Scoular Company offered to purchase the remaining segments. In its offer, Scoular stated:

> Most of the retail outlets will be offered for sale to the present Amoco plant managers [crop guide managers] at 82.5% of net book value. The retail outlets will be leased back under long term agreements.[3] Most of Amoco's employees, including the owner-manager [sic] of the leased retail outlets, will be offered comparable jobs.

On June 20, 1983, Standard prepared a letter announcing F & P's sale to Scoular and the effective date of the sale. According

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[2] The letter said:

> If the system is sold as a whole or in regional segments, current employees may be *offered employment by the purchaser. Should such sales not occur or employees are not offered employment by the new owners, Amoco will provide severance ... benefits.* (emphasis added).

[3] This arrangement was apparently proposed to allow Scoular to finance its acquisition of the F & P Division facilities.

to the letter, the closing date of the sale was August 31, 1983. Thus, on September 1, 1983, F & P employees could consider themselves terminated by Amoco and employed by Scoular. The letter stated "the termination date will be used as the effective date of employment for those employees who are offered and subsequently accept employment with the Scoular company."

As part of the agreement between Amoco and Scoular for the sale and purchase of F & P's assets, Scoular agreed to make offers of employment to those F & P employees listed on an attachment to the purchase agreement. Cropmate, the division created by Scoular to replace F & P, began reviewing crop guide managers and secondmen, presumably to compile the list of the employees it intended to retain. It was agreed that the list would be compiled by July 20, 1983.

In July, 1983, plaintiffs were invited to meet with Cropmate to discuss their employment. According to plaintiffs' version of the events, no offers of employment were made at the July meeting. Cropmate's formal presentation centered solely on the leaseback arrangement discussed in Scoular's April 29, 1983 letter. Plaintiffs allege that they were told if they did not enter into a leaseback arrangement with Cropmate, their jobs could not be guaranteed. At the conclusion of the meeting, virtually all the crop guide managers refused to sign a leaseback arrangement. When plaintiffs asked questions about severance, they allege they were simply told they did not qualify.

Defendants admit that "there are disputed factual issues regarding what was said at [that] meeting about employment with Cropmate and Cropmate's proposal that crop guide managers purchase from and lease back to Cropmate their retail outlets...." Nevertheless, defendants maintain plaintiffs were offered employement and were told that if they accepted employment with Cropmate, they would no longer be eligible for Amoco severance benefits. Defendants admit they did not

provide copies of the new severance policy or explain severance benefit claim procedures to plaintiffs. They claim however, that all employees were informed where to write or call for information. Amoco points out that all nine plaintiffs were placed on Cropmate's July employment list.

Shortly before August 31, 1983, the closing date of the sale, plaintiffs contend they were told to continue operating their facilities (apparently regardless of whether they entered into a leaseback arrangement). On September 1, 1983, eight of the nine plaintiffs began working for Cropmate. Only plaintiff Moldestad refused to work for Cropmate.

As of 1984, six of the nine plaintiffs remained in Cropmate's employ. Of those six, three purchased their retail outlets and leased them back to Cropmate. Plaintiff Young continued to work for Cropmate only until September 16, 1983. Plaintiff Broeker quit Cropmate in January, 1984, when Cropmate allegedly found a crop guide manager willing to buy his facility.

Plaintiffs Gossard, Young, and Bokelman sought severance benefits under the F & P plan in late August, 1983. At that time, Amoco called Cropmate and verified that those plaintiffs as well as the other six were employed by Cropmate.[4] Assured by Cropmate that all but plaintiff Moldestad were working for Cropmate, the administrator of Amoco's severance plan denied Gossard's, Young's and Bokelman's claims for benefits. Plaintiffs Godejahn, Moldestad, Pistulka, and Reinsma later sought benefits in November, 1983. Again, their claims were denied on the basis that they had received an offer of employment from Cropmate. Plaintiff Rohlf too claimed benefits, but not until March 30, 1984. That claim was also denied. Plaintiff Broeker did not claim benefits but was represented by attorneys for all the other plaintiffs who did.

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[4] Amoco contacted Cropmate on September 8, 1983, to verify the names on the July employment list and that all nine plaintiffs had been offered employment.

B .

On November 27, 1985, plaintiffs filed a second amended complaint under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1974), (ERISA), consolidating three class actions orginally filed on behalf of themselves and approximately 160 other crop guide managers in Indiana, Minnesota, and Ohio. In their suit, plaintiffs alleged that Standard and Amoco's failure, both individually and as co-administrators of the severance plan, to pay the plaintiffs severance benefits constituted: (1) a wanton and willful breach of plaintiffs' employement contract; (2) unjust enrichment to defendants; and (3) a wrongful, arbitrary, and capricious denial of benefits based on an unilateral modification of the severance plan. Plaintiffs further alleged that Standard and Amoco negligently administered the severance policy, breached their fiduciary duty, and failed to provide information with regard to the unilateral creation of the special F & P severance policy.

Plaintiffs sought compensatory damages equal to their severance payments, punitive damages, statutory penalties under ERISA, and attorney's fees.

Defendants filed a motion for summary judgment on all claims and urged the district court to delay ruling on the class certification issue until it had ruled on the motion for summary judgment, which defendants believed would resolve the case. The court agreed to do so. Both sides then provided the court with extensive briefs and reams of documentation.

After a hearing on the matter, the court issued an order on April 27, 1987, granting defendants' motion for summary judgment. Finding that ERISA preempts all state law claims for severance benefits, the court granted judgment to defendants on plaintiffs' breach of contract, unjust enrichment, and negligence claims. The district court ruled that plaintiffs' primary remaining claim was that defendants "acted wrongfully in creating the F & P Severance Policy in place of the 1981 Severance Policy to govern the F & P Division divestiture."

The district court then determined that severance benefits are "welfare benefits" and not retirement benefits under ERISA and that severance benefits are not subject to the stringent ERISA requirements governing retirement benefits. As a corollary, the court ruled an employee's interest in severance benefits does not vest like retirement benefits and may be unilaterally abolished by the employer. The district court then determined that an employer does not breach a fiduciary duty when it unilaterally amends a severance benefit plan in a sale-of-business context to avoid coverage to employees who continue to work for the purchaser. Thus, the claim that defendants' breached their fiduciary duty when they created the F & P policy, failed as a matter of law.

The court also granted defendants' judgment on plaintiffs' federal breach of contract claim indicating that ERISA does not contemplate that severance plans be treated as contracts. Finally, the court granted judgment on the ERISA discrimination claim, finding absolutely no facts to support such a claim.

The court then turned to the issue of whether the denial of plaintiffs' severance benefit claims was "arbitrary and capricious." The district court said:

> Plaintiffs further allege that the 'job offer' condition for severance under the F & P severance policy is 'arbitrary and capricious' because their jobs with Cropmate were or are unsecure unless they agreed to purchase from and lease back to Cropmate the retail outlets where they were employed. However, it is settled law under ERISA that plaintiffs may not challenge the substantive terms of a benefit plan as 'arbitrary and capricious,' and that a court may not redraw a plan's eligibility criteria to provide benefits to employees. . . .

The court also held that the plaintiffs had been informed of the requirements for obtaining benefits under the F & P severance plan. Thus, plaintiffs were not prejudiced by any alleged pro-

cedural violations. Moreover, procedural violations could not give rise to a claim for benefits. As a final matter the court determined that the defendants' decision to deny benefits was based on substantial evidence. Constrained to uphold the plan administrator's decision, if rational, the court found the denial of benefits appropriate given that all nine plaintiffs had been offered employment with Cropmate. This appeal followed.

C.

On appeal, plaintiffs contend summary judgment was inappropriate for two reasons. First, plaintiffs assert the district court resolved material issues of fact in the defendants' favor. Plaintiffs contend that they qualified for benefits under the F & P severance plan because they were never offered employment with Cropmate prior to their termination from Amoco. The fact that they automatically began working for Cropmate the day after their positions with Amoco were terminated was not, they insist, proof that they were offered employment. In fact, plaintiffs assert employment with Cropmate was conditioned on participation in the leaseback agreement, a fact of which defendants were aware when plaintiffs were terminated.

Defendants argue there is no question that all plaintiffs either worked for or were offered a position with Cropmate the day after their jobs with Amoco ended. Defendants assert that it was undisputed that none of the plaintiffs were required to purchase their retail outlets to become employed by Cropmate. The fact that Cropmate was looking for owner/managers for the retail facilities and therefore could not assure plaintiffs continued employment in the event the individual outlets were resold, was not relevant to the fact that plaintiffs were offered employment. The F & P division's special severance policy stated that if plaintiffs received a job offer from Cropmate, plaintiffs would no longer be eligible for benefits. The severance policy did not specify that the employment offer had to be for permanent or comparable employment. Thus, by rais-

ing issues relating to the leaseback arrangement and the unsecured nature of their employment, plaintiffs are impermissibly attacking the substantive protections afforded by the F & P severance plan.

Plaintiffs also contend summary judgment was inappropriate on their breach of fiduciary duty claim, arguing Amoco breached its duty when it unilaterally amended the 1981 severance plan without providing any notice of the change to them. Defendants' repeated failure to provide information regarding the consequences of those changes also contributed to this breach of duty.

Defendants point out that with respect to severance benefit plans, ERISA does not impose a fiduciary duty on the employer to act exclusively in the interest of the employees. Although the employer may be required to act in a fiduciary capacity in *administering* a benefit plan, there is no fiduciary duty in implementing, altering or abolishing a benefit plan involving nonvested interests. Thus, defendants were free to create the special F & P severance plan without notice to plaintiffs. Conceding that some notice of the terms of the plan might have been required after "the new plan [was] implemented," defendants argue that procedural violations arising from their failure to provide such notice does not amount to a violation of ERISA.

Finally, plaintiffs insist the district court applied the wrong standard for reviewing the benefit plan administrator's decision to deny benefits. According to plaintiffs, the district court failed to examine whether defendants acted in good faith. Defendants counter by pointing out that good faith has never been the standard for reviewing a decision to deny severance benefits. Thus, they argue that the district court did not err.

D.

Our review of the record, leads us to conclude that the district court's decision to grant defendants' motion for summary judgment was correct.

[1-4] Under ERISA, employee benefits are divided into two categories—"welfare" benefits and "retirement or pension" benefits. 29 U.S.C. § 1002(1)-(2). Although ERISA imposes stringent accrual, vesting, and funding requirements on retirement benefit plans, such requirements are not imposed on welfare benefit plans. 29 U.S.C. §§ 1051, 1081. Severance benefits plans are welfare benefit plans. *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1145 (4th Cir. 1985) *aff'd*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 559, *cert. denied*, 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986). *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 558 (1986). As such, severance benefits are unaccrued, unvested benefits. Moreover, severance benefit plans, though subject to certain disclosure (29 U.S.C. §§ 1021-1031) and fiduciary (29 U.S.C. §§ 1101-1114) requirements, are exempt from the more stringent ERISA requirements. 29 U.S.C. §§ 1051, 1081. An employer may therefore, unilaterally amend or eliminate a severance plan without violating ERISA. *Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984). This is so because an employer is permitted to act in a dual capacity as both the manager of its business and a fiduciary with respect to unaccrued benefits. An employer is therefore, free to alter or eliminate severance benefits (which are usually solely funded by the employer) without consideration of the employees' interests. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471, (11th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987). In short, an employer does not owe its employees a fiduciary duty when it amends or abolishes a severance benefit plan.

> . . . ERISA does not impress a trust upon [an employer's] corporate treasury for the payment of the contingent benefits. . . . It is the unfunded nature of the . . . contingent liability that distinguished [these benefits from vested benefits under ERISA].

Sutton, 724 F.2d at 412.

> [T]he mere fact that a company has named itself as a pension plan administrator or trustee does not restrict it from pursuing reasonable business behavior in negotiations concering pension benefits not otherwise affected by the requirements of ERISA.

United Ind. Flight Officers v. United Airlines, 756 F.2d 1262, 1268 (7th Cir. 1985), *quoting Sutton v. Weirton Steel Div. of Nat. Steel Corp.,* 567 F.Supp. 1184, 1201. Thus, just because Amoco administered its employees' severance plan, does not mean Amoco owed a fiduciary duty of care to its employees with respect to the amendment or abolishment of that plan. Though perhaps desirable in normal business conduct, Amoco owed no legal duty to reveal that it intended to create a special severance plan for the divestiture of the F & P division. We conclude the district court properly granted summary judgment on plaintiffs' breach of fiduciary claim.

We must next determine whether summary judgment was appropriate as to plaintiffs' claims that Amoco's denial of their severance benefit claims violated ERISA.

[5] A court will reverse a benefit determination only if it was arbitrary and capricious. 29 U.S.C. § 1001 *et seq.; Adcock v. Firestone Tire & Rubber Co.,* 822 F.2d 623 (6th Cir. 1987); *Anderson v. CIBA-Geigy Corp.,* 759 F.2d 1518 (11th Cir.), *cert. denied,* 474 U.S. 995, 106 S.Ct. 410, 88 L.Ed.2d 360 (1985); *Sly v. P.R. Mallory & Co., Inc.,* 712 F.2d 1209 (7th Cir. 1983). Plaintiffs contend the defendants' decision to deny benefits should be subject to a more stringent "good faith" standard of review whereby Amoco's motives for implementing the new F & P severance plan are subject to examination. Plaintiffs claim this standard should be applied because the F & P severance plan was the product of bad faith. That is, given the number of procedural violations committed by Amoco when it implemented the new plan, plaintiffs argue the plan was adopted

in bad faith.[5] Amoco's denial of their benefits, based on this plan, was therefore also in bad faith.

An argument similar to that made by plaintiffs in this case was made by plaintiffs in *Anderson v. CIBA-Geigy Corp.*, 759 F.2d 1518 (11th Cir. 1985). There, plaintiffs claimed their employer's failure to designate a plan administrator and to notify the employees of eligibility requirements mandated a different standard for reviewing the denial of their benefit claims. The Eleventh Circuit Court of Appeals rejected this argument, stating:

> Whatever the merits of plaintiffs' argument, there is simply no authority for the proposition that procedural errors in an ERISA plan's management requires something other than the arbitrary and capricious standard of review. On the contrary, in a case where ERISA's provisions were 'flouted' in a 'wholesale and flagrant manner,' the arbitrary and capricious standard was still applied . . . *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352-53 (9th Cir. 1984)
>
> . . . .

759 F.2d at 1521.

[6] In *Holland v. Burlington Industries, Inc.*, the Fourth Circuit Court of Appeals, also taking note of the *Blau* decision, rejected the argument that a different standard of review should be applied based on numerous procedural violations. "We see no reason to vary the standard based on procedural violations indicating bad faith, for such situations can be adequately resolved under the traditional standard." 772 F.2d at 1149.

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[5] These alleged violations included Amoco's failure to notify plaintiffs of the actual effects of the changes in the severance plan; Amoco's failure to make claim procedures known to plaintiffs; Amoco's unwillingness to discuss severance benefits; and Amoco's failure to make available more information about the plan.

We join the *Anderson* and *Holland* courts and reject plaintiffs' contention that something other than the arbitrary and capricious standard should be applied in reviewing Amoco's decision to deny plaintiffs' severance benefit claims. Although Amoco certainly could have provided plaintiffs more information regarding the effects of the new F & P severance plan, Amoco's failure to do so does not give rise to a different standard of review. Moreover, we do not consider the defendants' behavior to be as flagrant as that described in *Blau*. Amoco made general statements about severance eligibility requirements to its employees. The employees were also told where to obtain additional information. The severance plan was not actively concealed from them and they were notified when their benefit claims were denied.

The district court properly evaluated Amoco's decision to deny plaintiffs' benefit claims by applying the arbitrary and capricious standard of review. We must now determine whether the court's decision was correct.

Plaintiffs contend that there was a factual dispute about whether they were actually offered employment by Cropmate. Thus, Amoco's decision to deny benefits was arbitrary and capricious and summary judgment on that issue was inappropriate. At the district court, plaintiffs contended their continued employment with Cropmate was contingent on their acceptance of a leaseback arrangement with Cropmate. They assert the fact that they were still employed on the date the transfer of assets from Amoco to Cropmate was completed was, therefore, irrelevant in determining whether they had become employed by Cropmate. Plaintiffs argued they were never officially asked to stay on with Cropmate and should therefore have received severance benefits under the F & P plan.

Defendants maintained that all plaintiffs were employed by Cropmate on the day the transfer of assets was finalized, whether or not they had entered into a leaseback arrangement with Cropmate. In fact, six of the nine plaintiffs were still

employed by Cropmate in 1984 and 1985. The defendants claimed that plaintiffs' assertions that their continued employment with Cropmate could not be assured, absent an agreement to enter into a leaseback arrangement, is not relevant to the issue of whether plaintiffs were offered employment.

The district court agreed with defendants, finding that there was sufficient evidence before the plan administrator to support his conclusion that plaintiffs had all been offered employment with Cropmate. Therefore, plaintiffs were ineligible for benefits under the F & P severance plan. Given that the administrator's decision was rational, the district court granted defendants' motion for summary judgment.

[7] We agree with the district court. The evidence before the plan administrator was that all plaintiffs were terminated by Amoco on August 31, 1983, and became employees of Cropmate on September 1, 1983. Plaintiffs became employees of Cropmate whether they entered into a leaseback agreement or not. It is certainly true that plaintiffs may have thought they were required to enter into a leaseback arrangement, but on September 1, 1983, this notion was dispelled when plaintiffs became employed by Cropmate.

It is also true that plaintiffs' employment with Cropmate may have been less than secure and that they could have been terminated had Cropmate found someone willing to enter into a leaseback arrangement. However, the F & P severance plan did not make eligibility for benefits contingent on an offer of *comparable or permanent* employment, just employment.

Under the terms of the F & P severance policy, plaintiffs were ineligible for benefits once they were *offered* employment — whether permanent or not — with Cropmate. An express offer of employment may or may not have been made to plaintiffs at

the July, 1983 meeting between plaintiffs and Cropmate.[6] We cannot be sure because there are disputes about what occurred at that meeting. Nonetheless, an implicit offer of employment was made on September 1, 19833, when eight of the nine plaintiffs automatically became Cropmate employees. Only plaintiff Moldestad refused employment with Cropmate. Nevertheless, the evidence before the plan administrator was that Moldestad was on the list of Amoco employees to whom Cropmate made offers and hired. In addition Cropmate verified that is had offered employment to Moldestad but that he refused it.

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[6] From testimony of at least one plaintiff, all plaintiffs *were* offered employment by Cropmate in July, 1983.

[Deposition of Plaintiff Broeker, n. 45, Plaintiffs' Response to Defendants' Motion for Summary Judgment, pp. A2117 through A2119].

Q: Was there anything said at that [July 11, 1983] meeting about employment?

A: I think that what they told us was that we would be hired by Cropmate as employees. The plan was, we buy the plants, they would pay us this 13 and ½ percent, and if we go down to the bank and borrow the money at the prevailing rate, which was 13 and ½ percent, that 13 and ½ percent leaseback that they paid us would pay the principal payment as well as the interest payment and that we would become employees of Cropmate.

Q: Was anything said about having to purchase the plant in order to become employed?

A: The conversation that ensued, basically we were told that the plan was to sell the plant. That was what the Cropmate Company wanted, was for us to purchase the plant. If we did not purchase the plant, that did not necessarily mean that we would not become employed.

However, it also meant that there was no guarantee as to how long we would be employed, because their plan was to sell each and every plant and find a buyer and that the primary objective here was to make the buyer the manager, although in some cases that may not necessrily be the case.

If somebody bought the plant and did not want to run it, just wanted it for investment, then maybe the manager would get to run that plant.

By the same token, they said if the manager bought the plant, he wasn't necessarily guaranteed of being the manager but just the owner. If may be a situation where the company might want somebody else to run it.

All but plaintiff Moldestad accepted Cropmate's offer by staying with the company. At least six plaintiffs remained in Cropmate's employ as of 1984 and 1985 when their depositions were taken. Yet, only three of these six actually purchased their retail outlet and entered into a leaseback arrangement with Cropmate. Surely then, plaintiffs' employment with Cropmate was more secure than it might have seemed at first.

Plaintiffs' complaint that their continued employment with Cropmate was insecure is really a complaint that the F & P severance policy did not provide sufficient protection in the event that they were hired by the new owner of the F & P division but then released. This, as defendants point out, is an impermissible attack on the substantive merits of the severance plan. *See Moore v. Reynolds Metals Co. Retirement Program,* 740 F.2d 454, 456 n. 4 (6th Cir. 1984), *cert. denied,* 469 U.S. 1109, 105 S.Ct. 786, 83 L.Ed.2d (1985) (courts are not permitted to modify language of a benefit plan).

We conclude, based on the evidence presented to the Amoco plan administrator, there was no issue of fact whether plaintiffs were offered employment with Cropmate. Thus, we find that the administrator's decision to deny plaintiffs' claims was rational and the district court's resulting decision to grant summary judgment was appropriate.

The district court's order granting defendants' motion for summary judgment is AFFIRMED.

Q: So did you understnad [sic] then, even if you didn't buy the plant, there was a possibility of continued employment by Cropmate?

A: My understanding was that if I didn't buy the plant, I would probably have a job but it was questionable as to, especially in my position, I was kind of on the bubble so to speak because I had — It at the time was considered a pretty good plant and I knew there was a lot of people looking at it and the competition was just kind of standing around waiting for that plant to sell, and I knew that if — I felt that if I didn't buy it, my position was pretty shaky.

APPENDIX C

TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle A—General Provisions

Findings and Declaration of Policy

29 U.S.C.A. 1001

Sec. 2. (a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans: that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered;

that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits: and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

APPENDIX D

29 U.S.C. § 1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries. The administrator of each employee benefit plan shall cause to be furnished in accordance with section 104(b) [29 USCS § 1024(b)] to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 102(a)(1) [29 USCS § 1022(a)(1)]; and

(2) the information described in section 104(b)(3) [29 USCS § 1024(b)(3)] and 105(a) and (c) [29 USCS § 1025(a) and (c)].

(b) Plan description, modification and changes, and reports to be filed with Secretary of Labor. The administrator shall, in accordance with section 104(a) [29 USCS § 1024(a)], file with the Secretary—

(1) the summary plan description described in section 102(a)(1) [29 USCS § 1022(a)(1)];

(2) a plan description containing the matter required in section 102(b) [29 USCS § 1022(b)];

(3) modifications and changes referred to in section 102(a)(2) [29 USCS § 1022(a)(2)];

(4) the annual report containing the information required by section 103 [29 USCS § 1023]; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

(c) **Terminal and supplementary reports.** (1) Each administrator of an employee pension benefit plan which is winding up its affairs (without regard to the number of participants remaining in the plan) shall, in accordance with regulations prescribed by the Secretary, file such ter-

minal reports as the Secretary may consider necessary. A copy of such report shall also be filed with the Pension Benefit Guaranty Corporation.

(2) The Secretary may require terminal reports to be filed with regard to any employee welfare benefit plan which is winding up its affairs in accordance with regulations promulgated by the Secretary.

(3) The Secretary may reguire that a plan described in paragraph (1) or (2) file a supplementary or terminal report with the annual report in the year such plan is terminated and that a copy of such supplementary or terminal report in the case of a plan described in paragraph (1) be also filed with the Pension Benefit Guaranty Corporation.

(d) Cross references. For regulations relating to coordination of reports to the Secretaries of Labor and the Treasury, see section 3004 [29 USCS § 1204].

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 1, § 101, 88 Stat. 840.)

APPENDIX E

29 U.S.C. § 1022. Plan description and summary plan description

(a) (1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 USCS § 1024(b)]. The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 USCS § 1024(b)(1)].

(2) A plan description (containing the information required by subsection (b)) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1) [29 USCS § 1024(a)(1)]. Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 104(a)(1)(D) [29 USCS § 1024(a)(1)(D)].

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting

eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 USCS § 1133]).

(Sept. 2, 1974, P.L. 93-406, Title I, Subytitle B, Part 1, § 102, 88 Stat. 841.)

APPENDIX F

29 U.S.C. §1023. Annual reports

(a) Publication and Filing.

(1) (A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 104(a) [29 USCS § 1024(a)], and shall be made available and furnished to participants in accordance with section 104(b) [29 USCS § 1024(b)].

(B) The annual report shall include the information described in subsections (b) and (c) and where applicable subsections (d) and (e) and shall also include—

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

(2) If some or all of the information necessary to enable the administrator to comply with the requirements of this title is maintained by—

(A) an insurance carrier or other organization which provides some or all of the benefits under the plan, or holds assets of the plan in a separate account,

(B) a bank or similar institution which holds some or all of the assets of the plan in a common or collective trust or a separate trust, or custodial account, or

(C) a plan sponsor as defined in section 3(16)(B) [29 USCS § 1002(16)(B)],

such carrier, organization, bank, institution, or plan sponsor shall transmit and certify the accuracy of such information to the administrator within 120 days after the end of

the plan year (or such other date as may be prescribed under regulations of the Secretary.

(3) (A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinoin as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with general accepted accounting principles applied on a basis consistent with that of the preceeding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules specified in subsection (b)(3) of this section and the summary material required under section 104(b)(3) [29 USCS § 1024(b)(3)] present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report. In a case where a plan is not required to file an annual report, the requirements of this paragraph shall not apply. In a case where by reason of section 104(a)(2) [29 USCS § 1024(a)(2)] a plan is required only to file a simplified annual report, the Secretary may waive the requirements of this paragraph.

(B) In offering his opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he so states his reliance.

(C) The opinion required by subparagraph (A) need not be expressed as to any statements required by subsection (b)(3)(G) prepared by a bank or similar institution or insurance carrier regulated and supervised and subject to periodic examination by a State or Federal agency if such statements are certified by the bank, similar institution, or insurance carrier as accurate and are made a part of the annual report.

(D) For purposes of this title, the term "qualified public accountant" means—

(i) a person who is a certified public accountant, certified by a regulatory authority of a State; or

(ii) a person who is a licensed public accountant, licensed by a regulatory authority of a State; or

(iii) a person certified by the Secretary as a qualified public accountant in accordance with regulations published by him for a person who practices in State where there is no certification or licensing procedure for accountants.

(4) (A) The administrator of an employee pension benefit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section. In a case where a plan is not required to file an annual report, the requirement of this paragraph shall not apply, and, in a case where by reason of section 104(a)(2) [29 USCS § 1024(a)(2)], a plan is required only to file a simplified report, the

Secretary may waive the requirement of this paragraph.

(B) The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section—

(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and

(ii) represent his best estimate of anticipated experience under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

(C) For purposes of this title, the term "enrolled actuary" means an actuary enrolled under subtitle C of title III of this Act [26 USCS § 7701; 29 USCS §§ 1241, 1242].

(D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under section 103(b) [29 USCS § 1023(b)] as to which any qualified public accountant has expressed an opinion, if he so states his reliance.

(b) Financial statement. An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an amployee welfare benefit plan: a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes on benefits; a description of material lease

commitments, other commitments, and contigent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of the plan.

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; the funding policy (including policy with respect to prior service cost), and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of such pension plan.

(3) With respect to all employee benefit plans, the statement required under paragraph (1) and (2) shall have attached the following information in separate schedules:

(A) a statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative

form for the end of the previous fiscal year of the plan;

(B) a statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications;

(C) a schedule of all assets held for investment purposes aggregated and identified by issuer, borrower, or lessor, or similar party to the transaction (including a notation as to whether such party is known to be a party in interest), maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

(D) a schedule of each transaction involving a person known to be party in interest, the identity of such party in interest and his relationship or that of any other party in interest to the plan, a description of each asset to which the transaction relates; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction.

(E) a schedule of all loans or fixed income obligations which were in default as of the close of the plan's fiscal year or were classified during the year as uncollectable and the following information with respect to each loan on such schedule (including a notation as to whether parties involved are known to be parties in interest): the original principal amount of the loan, the amount of principal and interest received during the reporting year, the unpaid balance, the identity and address of the obligor, a detailed description of the loan (including date of making and maturity, interest rate, the type and value

of collateral, and other material terms), the amount of principal and interest overdue (if any) and an explanation thereof;

(F) a list of all leases which were in default or were classified during the year as uncollectable; and the following information with respect to each lease on such schedule (including a notation as to whether parties involved are known to be parties in interest): the type of property leased (and, in the case of fixed assets such as land, buildings, leasehold, and so forth, the location of the property), the identity of the lessor or lessee form or to whom the plan is leasing, the relationship of such lessors and lessees, if any, to the plan, the employer, employee organization, or any other party in interest, the terms of the lease regarding rent, taxes, insurance, repairs, expenses, and renewal options; the date the leased property was purchased and its cost, the date the property was leased and its approximate value at such date, the gross rental receipts during the reporting period, expenses paid for the leased property during the reporting period, the net receipts form the lease, the amounts in arrears, and a statement as to what steps have been taken to collect amounts due or otherwise remedy the default;

(G) if some or all of the assets of a plan or plans are held in a common or collective trust maintained by a bank or similar institution or in a separate account maintained by an insuramce carrier or a separate trust maintained by a bank as trustee, the report shall include the most recent annual statement of assets and liabilities of such common or collective trust, and in the case of a separate account or a separate trust, such other information as is required by the administrator in order to comply with this subsection; and

(H) a schedule of each reportable transaction, the name of each party to the transaction (except that, in of an aquisition or sale of a security on the market, the report need not identify the person from whom the security was acquired or to whom it was sold) and a description of each asset to which the transaction applies; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction. For purposes of the preceding sentence, the term "reportable transaction" means a transaction to which the plan is a party if such transaction is—

(i) a transaction involving an amount in excess of 3 percent of the current value of the assets of the plan;

(ii) any transaction (other than a transaction respecting a security) which is part of a series of transactions with or in conjunction with a person in a plan year, if the aggregate amount of such transactions exceeds 3 percent of the current value of the assets of the plan;

(iii) a transaction which is part of a series of transactions respecting one or more securities of the same issuer, if the aggregate amount of such transactions in the plan year exceeds 3 percent of the current value of the assets of the plan; or

(iv) a transaction with or in conjuction with a person erspecting a security, if any other transaction with or in conjunction with such person in the plan year respecting a security is required to be reported by reason of clause (i).

(4) The Secretary may, by regulation, relieve any plan from filing a copy of a statement of assets and liabilities (or

other information) described in paragraph (3)(G) if such statement and other is filed with the Secretary by the bank or insurance carrier which maintains the common or collective trust or separate account.

(c) Information to be furnished by administrator. The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

(2) The name and address of each fiduciary.

(3) Except in the case of a person whose compensation is minimal (determined under regulations of the Secretary) and who performs solely ministerial duties (determined under such regulations), the name of each person (including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest.

(4) An explanation of the reason for any change in appointment of trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian.

(5) Such financial and acturial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

(d) Actuarial statement. With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 301(b) [29 USCS § 1081(b)], or (C) a plan described both in section 4021(b) [29 USCS § 1321(b)] and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 301(a) [29 USCS § 1081(a)(1), (2), (3), (4), (5), (6), or (7)]) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report is filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an indentification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 302 [29 USCS § 1082].

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) the current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 302 [29 USCS § 1082] and a statement explaining the basis of such valuation of present value of assets.

(6) The present value of all of the plan's liabilities for nonforfeitable pension benefits allocated by the termination

priority categories as set forth in section 4044 of this Act [29 USCS § 1344], and the actuarial assumptions used in these computations. The Secretary shall establish regulations defining (for purposes of this section) "termination priority categories" and acceptable methods, including approximate methods, for allocating the plan's liabilities to such termination priority categories.

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary—

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 302(c)(3) [29 USCS § 1082(c)(3)] (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4).

(10) A statement by the actuary which discloses—

(A) any event which the actuary has not taken into account, and

(B) any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future,

but only if, to the best of the actuary's knowledge such event or trend may require a material increase in plan costs or required contribution rates.

(11) Such other information regarding the plan as the Secretary may be regulation require.

(12) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

(e) Statement from insurance company, insurance service, or other similar organizations which sell or guarantee plan benefits. If some or all of the benefits under the plan are purchased from and guaranteed by an insurance company, insurance service, or other similar organization, a report under this section shall include a statement from such insurance company, service, or other similar organization covering the plan year and enumerating—

(1) the premium rate or subscription charge and the total premium or subscription charges paid to each such carrier, insurance service, or other similar organization and the approximate number persons covered by each class of such benefits; and

(2) the total amount of premiums received, the approximate number of persons covered by each class of benefits, and the total claims paid by such company, service, or other organization; dividends or retroactive rate adjustments, commissions, and administrative service or other fees or other specific acquisition costs paid by such company, service, or other orgainzation; any amounts held to provide benefits after retirement; the remainder of such premiums; and the names and addresses of the brokers, agents, or other persons to whom commissions or fees were paid, the amount paid to each, and for what purpose. If any such company, service, or other organization does not maintain separate experience records covering the specific groups it serves, the report shall include in lieu of the information required by the foregoing provisions of this paragraph (A) a statement as to the basis of its premium rate or subscription charge, the total amount of premiums or subscription charges received from the plan, and a copy of the financial report of the company, service, or other organization and (B) if such company, service, or organization incurs specific costs in connection with the acquisition or retention of any particular plan or plans, a detailed statement of such costs.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 1, § 103, 88 Stat. 841; Sept. 26, 1980, P. L. 96-4364 Title III, § 307, 94 Stat. 1295.)

APPENDIX G

29 U.S.C. § 1024. Filing and furnishing of information

(a) **Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary.** (1) The Administrator of any employee benefit plan subject to this part shall file with the Secretary—

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frefuently than once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 102(a)(2) [29 USCS § 1022(a)(2)] within 60 days after such modification or change is adopted or occurs, as the case may be.

The Secretary shall make copies of such plan descriptions, summary plan descriptions, and annual reports available for inspection in the public document room of the Department of Labor. The administrator shall also furnish to the Secretary, upon request, any documents relating to the employee benefit plan, including but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.

(2) (A) With respect to annual reports required to be filed with the Secretary under this part, he may by regulation prescribe simplified annual reports for any pen-

sion plan which covers less than 100 participants. In addition, and without limiting the foregoing sentence, the Secretary may waive or modify the requirements of section 103(d)(6) [29 USCS § 1023(d)(6)] in such cases or categories of cases as to which he finds that (i) the interest of the plan participants are not harmed thereby and (ii) the expense of compliance with the specific requirements of section 103(d)(6) [29 USCS § 1023(d)(6)] is not justified by the needs of the participants, the Pension Benefit Guarnaty Corporation, and the Department of Labor for some portion or all of the information otherwise required under section 103(d)(6) [29 USCS § 1023(d)(6)].

(B) Nothing contained in this paragraph shall preclude the Secretary from requiring any information or data from any such plan to which this part applies where he finds such data or information is necessary to carry out the purposes of this title nor shall the Secretary be precluded from revoking provisions for simplified reports for any such plan if he finds it necessary to do so in order to carry out the objectives of this title.

(3) The Secretary may by regulation exempt any welfare benefit plan from all or part of the reporting and disclosure requirements of this title, or may provide for simplified reporting and disclosure if he finds that such requirements are inappropriate as applied to welfare benefit plans.

(4) The Secretary may reject any filing under this section—

(A) if he determines that such filing is incomplete for purposes of this part; or

(B) if he determines that there is any material qualifications by an accountant or actuary contained in an opinion submitted pursuant to section 103(a)(3)(A) or section 103(a)(4)(B) [29 USCS § 1023(a)(3)(A) or (4)(B)].

(5) If the Secretary rejects a filing of a report under paragraph (4) and if a revised filing satisfactory to the Secretary is not submitted within 45 days after the Secretary makes his determination under paragraph (4) to reject the filing, and if the Secretary deems it in the best interest of the participants, he may take any one or more of the following actions—

(A) retain an independent qualified public accountant (as defined in section 103(a)(3)(D) [29 USCS § 1023(a)(3)(D)]) on behalf of the participants to perform an audit,

(B) retain an rerolled actuary (as defined in section 103(a)(4)(C) of this Act [29 USCS § 1023(a)(4)(C)]) on behalf of the plan participants, to prepare an actuarial statement.

(C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part, or

(D) take any other action authorized by this title.

The administrator shall permit such accountant or actuary to inspect whatever books and records of the plan are necessary for such audit. The plan shall be liable to the Secretary for the expenses for such audit or report, and the Secretary may bring an action against the plan in any court of competent jurisdiction to recover such expenses.

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan. Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 102(a)(1) [29 USCS § 1022(a)(1)]—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 102 [29 USCS § 1022] which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 102 [29 USCS § 1022] every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 102(a)(1)]29 USCS § 1022(a)(1)], a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant,

and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 103(b)(3) [29 USCS § 1023 (b)(3)(A), and (B)] and such other material as is necessary to fairly summerize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The adminisrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may be regulation prescribe the maximum amount which will constitute a reasonable charge under the preceeding sentence.

(c) Statement of rights. The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this title.

(d) Cross references For regulations respecting coordination of reports to the Secretaries of Labor and the Treasury, see section 3004 [29 USCS § 1204].

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 1, § 104, 88 Stat. 847.)

APPENDIX H

29 U.S.C. § 1025. Reporting of participant's benefit rights

(a) Statement furnished by administrator to participants and beneficiaries. Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

(b) One-per-year limit on reports. In no case shall a participant or beneficiary be entitled under this section to receive more than one report described in subsection (a) during any one 12 month period.

(c) Individual statement furnished by administrator to participants setting forth information in administrator's Internal Revenue registration statement. Each administrator required to register under section 6057 of the Internal Revenue Code of 1954 [26 USCS § 6057] shall, before the expiration of the time prescribed for such registration, furnish to each participant described in subsection (a)(2)(C) of such section [26 USCS § 6057(a)(2)(C)], an individual statement setting forth the information with respect to such participant required to be continued in the registration statement required by section 6057(a)(2) of such Code [26 USCS § 6057(a)(2)].

(d) Plans to which more than one unaffiliated employer is required to contribute; regulations. Subsection (a) of this section shall apply to a plan to which more than one unaffiliated employer is required to contribute only to the extent provided in regulations prescribed by the Secretary in coordination with the Secretary of the Treasury.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 1, § 105, 88 Stat. 849.)

APPENDIX I

29 U.S.C. § 1026. Reports made public information

(a) Except as provided in subsection (b), the contents of the descriptions, annual reports, statements, and other documents filed with the Secretary pursuant to this part shall be public information and the Secretary shall make any such information and data available for inspection in the public document room of the Department of Labor. The Secretary may use the information and data for statistical and research purposes, and compile and publish such studies, analyses, reports, and surveys based thereon as he may deem appropriate.

(b) Information described in section 105(a) and 105(c) [29 USCS § 1025(a) and (c)] with respect to a participant may be disclosed only to the extent that information respecting that participant's benefits under title II of the Social Security Act [42 USCS §§ 401 et seq.] may be disclosed under such Act [42 USCS §§ 301 et seq.].

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 1, § 106, 88 Stat 850.)

APPENDIX J

29 U.S.C. § 1027. Retention of records

Every person subject to a requirement to file any description or report or to certify any information therefor under this title or who would be subject to such a requirement but for an exemption or simplified reporting requirement under section 104(a)(2) or (3) of this title [29 USCS § 1024(a)(2) or(3)] shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than six years after the filing date of the documents based on the information which they contain, or six years after the date on which such documents would have been filed but for an exemption or simplified reporting requirement under section 104(a)(2) or (3) [29 USCS § 1024(a)(2) or (3)].

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 1, § 107, 88 Stat. 850.)

APPENDIX K

29 U.S.C. §1028. Reliance on administrative interpretations

In any criminal proceeding under section 501 [29 USCS § 1131] based on any act or omission in alleged violation of this part or section 412 [29 USCS § 1112], no person shall be subject to any liability or punishment for or on account of the failure of such person to (1) comply with this part of section 412 [29 USCS § 1112], if he pleads and proves that the act of omission complained of was in good faith, in conformity with, and in reliance on any regulation or written ruling of the Secretary, or (2) publish and file any information required by any provision of this part if he pleads and proves that he published and filed such information in good faith, and in conformity with any regulation or written ruling of the Secretary issued under this part regarding the filing of such reports. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be valid or of no legal effect, or (B) after publishing or filing the plan description, annual reports, and other reports required by this title, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this part.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 1, § 108, 88 Stat. 850.)

APPENDIX L

29 U.S.C. §1029. Forms

(a) Information required on forms. Except as provided in subsection (b) of this section, the Secretary may require that any information required under this title to be submitted to him, including but not limited to the information required to be filed by the administrator pursuant to section 103(b)(3) and (c) [29 USCS § 1023(b)(3) and (c)], must be submitted on such forms as he may prescribe.

(b) Information not required on forms. The financial statement and opinion required to be prepared by an independent qualified public accountant pursuant to section 103(a)(3)(A) [29 USCS § 1023(a)(3)(A)], the actuarial statement required to be prepared by an enrolled actuary pursuant to section 103(a)(4)(A) [29 USCS § 1023(a)(4)(A)] and the summary plan description required by section 102(a) [29 USCS § 1022(a)] shall not be required to be submitted on forms.

(c) Format and content of summary plan description, annual report, etc., required to be furnished to plan participants and beneficiaries. The Secretary may prescribe the format and content of the summary plan description, the summary of the annual report described in section 104(b)(3) [29 USCS § 1024(b)(3)] and any other report, statements or documents (other than the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated), which are required to be furnished or made available to plan participants and beneficiaries receiving benefits under the plan.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 1, § 109, 88 Stat. 850.)

APPENDIX M

29 U.S.C. §1030. Alternative methods of compliance

(a) The Secretary on his own motion or after having received the petition of an administrator may prescribe an alternative method for satisfying any requirement of this part with respect to any pension plan, or class of pension plans, subject to such requirement if he determines—

(1) that the use of such alternative method is consistent with the purposes of this title and that it provides adequate disclosure to the participants and beneficiaries in the plan, and adequate reporting to the Secretary,

(2) that the application of such requirement of this part would—

(A) increase the costs to the plan, or

(B) impose unreasonable administrative burdens with respect to the operation of the plan, having regard to the particular characteristics of the plan or the type of plan involved; and

(3) that the application of this part would be adverse to the interests of plan participants in the aggregate.

(b) An alternative method may be prescribed under subsection (a) by regulation or otherwise. If an alternative method is prescribed other than by regulation, the Secretary shall provide notice and an opportunity for interested persons to present their views, and shall publish in the Federal Register the provisions of such alternative method.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 1, § 110, 88 Stat. 851.)

APPENDIX N

29 U.S.C. §1031. Repeal and effective date

(a) (1) The Welfare and Pension Plans Disclosure Act is repealed except that such Act shall continue to apply to any conduct and events which occurred before the effective date of this part.

(2) (A) Section 664 of title 18, United States Code [18 USCS § 664], is amended by striking out "any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act" and inserting in lieu thereof "any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974."

(B) (i) Section 1027 of such title 18 [18 USCS § 1027] is amended by striking out "Welfare and Pension Plans Disclosure Act" and inserting in lieu thereof "title I of the Employment Retirement Income Security Act of 1974," and striking out "Act" each place it appears and inserting in lieu thereof "title."

(ii) The heading for such section is amended by striking out "WELFARE AND PENSION PLANS DISCLOSURE ACT" and inserting in lieu thereof "EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974."

(iii) The table of sections of chapter 47 of such title 18 [18 prec. § 1001] is amended by striking out "Welfare and Pension Plans Disclosure Act" in the item relating to section 1027 [18 USCS § 1027] and inserting in lieu thereof "Employee Retirement Income Act of 1974."

(C) Section 1954 of such title 18 [18 USCS § 1954] is amended by striking out "any plan subject to the provisions of the Welfare and Pension Plans Disclosure

Act as amended" and inserting in lieu therof "any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974"; and by striking out "section 3(3) and 5(b)(1) and (2) of the Welfare and Pension Plans Disclosure Act, as amended" and inserting in lieu thereof "sections 3(4) and 3(16) of the Employee Retirement Income Security Act of 1974."

(D) Section 211 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 441) [29 USCS § 441] is amended by striking out "Welfare and Pension Plans Disclosure Act" and inserting in lieu thereof "Employee Retirement Income Security Act of 1974."

(b) (1) Except as provided in paragraph (2), this part (including the amendment and repeals made by subsection (a)) shall take effect on January 1, 1975.

(2) In the case of a plan which has a plan year which begins before January 1, 1975, and ends after December 31, 1974, the Secretary may postpone by regulation the effective date of the repeal of any provision of the Welfare and Pension Plans Disclosure Act (and of any amendment made by subsection (a)(2)) and the effective date of any provision of this part, until the beginning of the first plan year of such plan which begins after January 1, 1975.

(c) The provisions of this title authorizing the Secretary to promulgate regulations shall take effect on the date of enactment of this Act [enacted Sept. 2, 1974].

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 1, § 111, 88 Stat. 851.)

APPENDIX O

29 U.S.C. §1101. Coverage

(a) This part shall apply to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] (and not exempted under section 4(b) [29 USCS § 1003(b)], other than—

(1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; or

(2) any agreement descrribed in section 736 of the Internal Revenue Code of 1954 [26 USCS § 736], which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

(b) For purposes of this part:

(1) In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such investment company.

(2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:

(A) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a State.

(B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 401, 88 Stat. 874.)

APPENDIX P

29 U.S.C. §1102. Establishment of plan

(a) **Named fiduciaries.** (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) **Requisite features of plan.** Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirement of this title,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 405(c)(1) [29 USCS § 1105(c)(1)],

(3) provide a procedure for amending such plan, and for indentifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) **Optional features of plan.** Any employee benefit plan may provide—

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 405(c)(1) [29 USCS § 1105(c)(1)], may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 402, 88 Stat. 875.)

APPENDIX Q

29 U.S.C. §1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees. Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall either named in the trust instrument or in the plan instrument described in section 402(a) [29 USCS § 1102(a)] or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this Act, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 402(c)(3) [28 USCS § 1102(c)(3)].

(b) Exceptions. The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan—

(i) some or all of the participants of which are employees described in section 401(c)(1) of the Internal Revenue Code of 1954 [26 USCS § 401(c)(1)]; or

(ii) which consists of one or more individual retirement accounts described in section 408 of the Internal Revenue Code of 1954 [26 USCS § 408], to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of such Code [26 USCS § 401(f) or § 408(h)], whichever is applicable;

(4) to a plan which the Secretary exempts from the requirement of subsection (a) and which is not subject to any of the following provisions of this Act—

(A) part 2 of this subtitle [29 USCS §§ 1051 et seq.],

(B) part 3 of this subtitle [29 USCS §§ 1081 et seq., or

(C) title IV of this Act; or

(5) to a contract established and maintained under section 403(b) of the Internal Revenue Code of 1954 [26 USCS § 403(b)] to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of such Code [26 USCS § 403(b)(7)].

(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this Act.

(c) **Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets.** (1) Except as provided in paragraph (2), (3), or (4) or subsection (d), or under section 4042 [29 USCS § 1342] and 4044 [29 USCS § 1344] (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries

and defraying reasonable expenses of administering the plan.

(2) (A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of part iv—

(i) made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and

(ii) made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of the Internal Revenue Code of 1954 [26 USCS § 401(a)] or the trust which is part of such plan is exempt from taxation under section 501(a) of such Code [26 USCS § 501(a)]), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

(B) If a contribution is conditioned on qualification of the plan under section 401, 403(a) or 405(a)], and if the plan does not qualify, then paragraph (1) shall not prohibit the return of such contirbution to the employer within one year after the date of denial of qualification of the plan.

(C) If a contribution is conditioned upon the deductibility of the contribution under section 404 of the Internal Revenue Code of 1954 [26 USCS § 404], then, to the extent the deduction is disallowed, paragraph (1) shall not prohibit the return to the employer of such contribution (to the extent disallowed) within one year after the disallowance of the deduction.

(3) In the case of a contribution which would otherwise be an excess contribution (as defined in section 4972(b) of the Internal Revenue Codeof 1954 [26 USCS § 4972(b)]) paragraph (1) shall not prohibit a correcting distribution with respect to such contribution from the plan to the employer to the extent permitted in such section to avoid payment of an excise tax on excess contributions under such section.

(4) In the case of a withdrawal liability payment which has been determined to be an overpayment, paragraph (1) shall not prohibit the return of such payment to the employer within 6 months after the date of such determination.

(d) **Termination of plan.** Upon termination of a pension plan to which section 4021 [29 USCS § 1321] does not apply at the time of termination and to which this part [29 USCS §§ 1101 et seq.] applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 4044 of this Act [29 USCS § 1344], except as otherwise provided in regulations of the Secretary.

(2) The assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 4, § 403, 88 Stat. 876; Sept. 26, 1980, P.L. 96-364, Title III, § 310, Title IV, §§ 402(b)(2), 410(a), 411(c), 94 Stat. 1296, 1299, 1308.)

APPENDIX R

29 U.S.C. § 1104. Fiduciary duties

(a) **Prudent man standard of care.** (1) Subject to sections 403(c) and (d) [29 USCS § 1103(c) and (d)], 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 USCS § 1107(d)(3)]), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [29 USCS § 1107(d(4) and (5)]).

(b) Indicia of ownership of assets outside jurisdiction of district courts. Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary. In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 4, § 404, 88 Stat. 877; Sept. 26, 1980, P.L. 96-364, Title III, § 309, 94 Stat. 1296.)

APPENDIX S

29 U.S.C. § 1105. Liability for breach by co-fiduciary

(a) Circumstances giving to liability. In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1) [29 USCS § 1104(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b) Assets held by two or more trustees. (1) Except as otherwise provided in subsection (d) and in section 403(a)(1) and (2) [29 USCS § 1103(a)(1) and (2)], if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a cotrustee from commiting a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of

another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) or any other provision of this part.

(3) (A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 403(a)(1) [29 USCS § 1103(a)(1)].

(c) **Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities.** (1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 404(a)(1) [29 USCS § 1104(a)(1)]—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a).

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 402(c)(3) [29 USCS § 1102(c)(2)].

(d) **Investment managers.** (1) If an investment manager or managers have been appointed under section 402(c)(3) [29 USCS § 1102(c)(3)], then, notwithstanding subsections (a)(2) and (3) and subsection (b), no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 4, § 405, 88 Stat. 878.)

APPENDIX T

29 U.S.C. § 1106. Prohibited transactions

(a) Transactions between plan and party in interest. Except as provided in section 408 [29 USCS § 1108]:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interes;

(B) lending of money or other extention of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 USCS § 1107(a)].

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [29 USCS § 1107(a)].

(b) Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest. A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 4, § 406, 88 Stat. 879.)

APPENDIX U

29 U.S.C. §1107. Limitation with respect to acquisition and holding of employer securities and employer real property by certain plans

(a) Percentage limitation. Except as otherwise provided in this section and section 414 [29 USCS § 1114]:

(1) A plan may not acquire or hold—

(A) any employer security which is not a qualifying employer security, or

(B) any employer real property which is not qualifying employer real property.

(2) A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

(3) (A) After December 31, 1984, a plan may not hold any qualifying employer securities or qualifying employer real property (or both) to the extent that the aggregate fair market value of such securities and property determined on December 31, 1984, exceeds 10 percent of the greater of—

(i) the fair market value of the assets of the plan, determined on December 31, 1984, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(B) Subparagraph (A) of this paragraph shall not apply to any plan which on any date after December 31, 1974;[,] and before January 1, 1985, did not hold employer securities or employer real property (or both) the aggregate fair market value of which determined on such date exceeded 10 percent of the greater of

(i) the fair market value of the assets of the plan, determined on such date, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(4) (A) After December 31, 1979, a plan may not hold any employer securities or employer real property in excess of the amount specified in regulations under subparagraph (B). This subparagraph shall not apply to a plan after the earliest date after December 31, 1974, on which it complies with such regulations.

(B) Not later than December 31, 1976, the Secretary shall prescribe regulations which shall have the effect of requiring that a plan divest itself of 50 percent of the holdings of employer securities and employer real property which the plan would be required to divest before January 1, 1985, under paragraph (2) or subsection (c) (whichever is applicable).

(b) Exception. (1) Subsection (a) of this section shall not apply to any acquisition or holding of qualifying employer securities or qualifying employer real property by an eligible individual account plan.

(2) Cross references. (A) For exemption from diversification requirements for holding of qualifying employer securities and qualifying employer real property by eligible individual account plans, see section 404(a)(2) [29 USCS § 1104(a)(2)].

(B) For exemption from prohibited transactions for certain acquisitions of qualifying employer securities and qualifying employer real property which are not in violation of 10 percent limitation, see section 408(c) [29 USCS § 1108(e)].

(C) For transitional rules respecting securities or real property subject to binding contracts in effect on June 30, 1974, see section 414(c) [29 USCS § 1114(c)].

(c) **Election.** (1) A plan which makes the election, under paragraph (3) shall be treated as satisfying the requirement of subsection (a)(3) if and only if employer securities held on any date after December 31, 1974 and before January 1, 1985 have a fair market value, determined as of December 31, 1984, not in excess of 10 percent of the lesser of—

(A) the fair market value of the assets of the plan determined on such date (disregarding any portion of the fair market value of employer securities which is attributable to appreciation of such securities after December 31, 1974) but not less than the fair market value of plan assets on January 1, 1975, or

(B) an amount equal to the sum of (i) the total amount of the contributions to the plan received after December 31, 1974, and prior to such date, plus (ii) the fair market value of the assets of the plan, determined on January 1, 1975.

(2) For purposes of this subsection, in the case of an employer security held by a plan after January 1, 1975, the ownership of which is derived from ownership of employer securities held by the plan on January 1, 1975, or from the exercise of rights derived from such ownership, the value of such security held after January 1, 1975, shall be based on the value as of January 1, 1975, of the security from which ownership was derived. The Secretary shall prescribe regulations to carry out this paragraph.

(3) An election under this paragraph may not be made after December 31, 1975. Such an election shall be made in accordance with regulations prescribed by the Secretary, and shall be irrevocable. A plan may make an election under this paragraph only if on January 1, 1975, the plan holds no employer real property. After such election and before January 1, 1985 the plan may not acquire any employer real property.

(d) Definitions. For purposes of this section—

(1) The term "employer security" means a security issued by an employer of employees covered by the plan, or by an affiliate of such employer. A contract to which section 408(b)(5) [29 USCS § 1108(b)(5)] applies shall not be treated as a security for purposes of this section.

(2) The term "employer real property" means real property (and related personal property) which is leased to an employer of employees covered by the plan, or to an affiliate of such employer. For purposes of determining the time at which a plan acquires employer real property for purposes of this section, such property shall be deemed to be acquired by the plan on the date on which the plan acquires the property or on the date on which the lease to the employer (or affiliate) is entered into, whichever is later.

(3) (A) The term "eligible individual account plan" means an individual account plan which is (i) a profit-sharing, stock bonus, thrift, or savings plan; (ii) an employee stock ownership plan; or (iii) a money purchase plan which was in existence on the date of enactment of this Act [enacted Sept. 2, 1974] and which on such date invested primarily in qualifying employer securities. Such term excludes an individual retirement account or annuity described in section 408 of the Internal Revenue Code of 1954 [26 USCS § 408].

(B) Notwithstanding subparagraph (A), a plan shall be treated as an eligible individual account plan with respect to the acquisition or holding of qualifying employer real property or qualifying employer securities only if such plan explicitly provides for acquisition and holding of qualifying employer securities or qualifying employer real property (as the case my be). In the case of a plan in existence on the date of enactment of this Act [enacted Sept. 2. 1974],

this subparagraph shall not take effect until January 1, 1976.

(4) The term "qualifying employer real property" means parcels of employer real property—

(A) if a substantial number of the parcels are dispersed geographically;

(B) if each parcel of real property and the improvement thereon are suitable (or adaptable without excessive cost) for more than one use;

(C) even if all of such real property is leased to one lessee (which may be an employer, or an affiliate of an employer); and

(D) if the acquisition and retention of such property comply with the provisions of this part (other than section 404(a)(1)(B) [29 USCS § 1104(a)(1)(B)] to the extent it requires diversification, and sections 404(a)(1)(C), 406 [29 USCS §§ 1104(a)(1)(C), 1106], and subsection (a) of this section).

(5) The term "qualifying employer security" means an employer security which is stock or a marketable obligation (as defined in subsection (e)).

(6) The term "employee stock ownership plan" means an individual account plan—

(A) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase both of which are qualified, under section 401 of the Internal Revenue Code of 1954 [26 USCS § 401], and which is designed to invest primarily in qualifying employee securities, and

(B) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

(7) A corporation is an affiliate of an employer if it is a member of any controlled group of corporation (as defin-

ed in section 1563(a) of the Internal Revenue Code of 1954 [26 USCS § 1563(a)], except that "applicable percentage" shall be substituted for "80 percent"wherever the latter percentage appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term "applicable percentage" means 50 percent, or such lower percentage as the Secretary may prescriber by regulation. A person other than a corporation shall be treated as an affiliate of an employer to the extent provided in regulations of the Secretary. An employer which is a person other than a corporation shall be treated as affiliated with another person to the extent provided by regulations of the Secretary. Regulations under this paragraph shall be prescribed only after consultation and coordination with the Secretary of the Treasury.

(8) The Secretary may prescribe regulations specifying the extent to which conversions, splits, the exercise of rights, and similar transacts are not treated as acquisitions.

(e) Marketable obligations. For purposes of subsection (d)(5), the term "marketable obligation" means a bond, debenture, note, or certificate, or other evidence of indebtedness (hereinafter in this subsection referred to as "obligation") if—

(1) such obligation is acquired—

(A) on the market, either (i) at the price of the obligation prevailing on a national securities exchange which is registered with the Securities and Exchange Commission, or (ii) if the obligation is not traded on such a national securities exchange, at a price not less favorable to the plan than the offering price for the obligation as established by current bid and asked prices quoted by persons independent of the issuer;

(B) from an underwriter, at a price (i) not in excess of the pubic offering price for the obligation as set forth in a prospectus or offering circular filed with the

Securities and Exchange Commission, and (ii) at which a substantial portion of the same issue is acquired by persons independent of the issuer; or

(C) directly from the issuer, at a price not less favorable to the plan than the price paid currently for a substantial portion of the same issue by persons independent of the issuer;

(2) immediately following acquisition of such obligation—

(A) not more than 25 percent of the aggregate amount of obligations issued in such issue and outstanding at the time of acquisition is held by the plan, and

(B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer; and

(3) immediately following acquisition of the obligation, not more than 25 percent of the assets of the plan is invested in obligations of the employer or an affiliate of the employer.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 407, 88 Stat. 880.)

APPENDIX V

29 U.S.C. § 1108. Exemptions from prohibited transactions

(a) Grant of exemptions. The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 [29 USCS § 1106] and 407(a) [29 USCS § 1107(a)]. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this Act. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 406(a) [29 USCS § 1106(a)] or 407(a) [29 USCS § 1107(a)], the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 406(b) [29 USCS § 1106(b)] unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) Enumeration of transactions exempted from 29 USCS § 1106 prohibitions. The prohibitions provided in section 406 [29 USCS § 1106] shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees, officers, or shareholders in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operationof the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 407(d)(6) [29 USCS § 1107(d)(6)]), if—

> (A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and
>
> (B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 407(d)(5) [29 USCS § 1107(d)(5)]).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

> (A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan

if such assets are distributed in the same manner as provided under section 4044 of this Act [29 USCS § 1344] (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of title IV [29 USCS §§ 1381 et seq.].

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 [29 USCS § 1411].

(c) Fiduciary benefits and compensation not prohibited by 29 USCS § 1106. Nothing in section 406 [29 USCS § 1106] shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

(d) Owner-employees; family members; shareholder employees. Section 407(b) [29 USCS § 1107] and subsections (a), (b), (c), and (e) of this section shall not apply to any transaction in which a plan, directly or indirectly—

(1) lends any part of the corpus or income of the plan to;

(2) pays any compensation for personal services rendered to the plan to; or

(3) acquires for the plan any property from or sells any property to;

any person who is with respect to the plan an owner-employee (as defined in section 401(c)(3) of the Internal Revenue Code of 1954 [26 USCS § 401(c)(3)]), a member of the family (as defined in section 267(c)(4) of such Code [26 USCS § 267(c)(4)]) of any such owner-employee, or a corporation controlled by any such owner-employee through the ownership, directly or indirectly, of 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation. For purposes of this subsection a shareholder employee (as defined in section 1379 of the Internal Revenue Code of 1954 [26 USCS § 1379]) and a participant or beneficiary of an individual retirement account, individual retirement annuity, or an individual retirement bond (as defined in section 408 or 409 of the Internal Revenue Code of 1954 [26 USCS §§ 408 or 409]) and an employer or association of employers which establishes such an account or annuity under section 408(c) of such code [26 USCS § 408(c)] shall be deemed to be an owner-employee.

(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property. Sections 406 and 407 [29 USCS §§ 1106 and 1107] shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 407)d)(5) [29 USCS § 1107(d)(5)]) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 407(d)(4) [29 USCS § 1107(d)(4)]—

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under Section 407(e)(1) [29 USCS § 1107(e)(1)]),

(2) if no commission is charged with respect thereto, and

(3) if—

(A) the plan is an eligible individual account plan (as defined in section 407(d)(3) [29 USCS § 1107(d)(3)]), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 407(a) [29 USCS § 1107(a)].

(f) Applicability of statutory prohibitions to mergers or transfers. Section 406(b)(2) [29 USCS 1106(b)(2)] shall not apply to any merger or transfer described in subsection)b)(11).

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 408, 88 Stat. 883; Sept. 26, 1980, P. L. 96-364, Title III, § 308, 94 Stat. 1295.)

29 U.S.C. § 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 USCS § 1111].

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 409, 88 Stat. 886.)

APPENDIX W

29 U.S.C. § 1110. Exculpatory provisions; insurance

(a) Except as provided in sections 405(b)(1) and 405(d) [29 USCS § 1105(b)(1) and (d)], any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(b) Nothing in this subpart [part] shall preclude—

(1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary;

(2) a fiduciary from purchasing insurance to cover liability under this part from and for his own account; or

(3) an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 410, 88 Stat. 886.)

APPENDIX X

29 U.S.C. § 1111. Prohibition against certain persons holding certain positions

(a) Conviction or imprisonment. No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 102(6) of the Comprehensive Drug Abuse Prevention and Control Act ;of 1970 [21 USCS § 802(6)], murder, rape, kidnaping, perjury, assault with intent to kill, any crime described in section 9(a)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a-9(a)(1)) [15 USCS § 80a-9(a)(1)], a violation of any provision of this Act, a violation of section 302 of the Labor-management Relations Act, 1947 (29 U.S.C. 186) [29 USCS § 186], a violation of chapter 63 of title 18, United States Code [18 USCS §§ 1341 et seq.], a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, United States Code [18 USCS §§ 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954], a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401), or conspiracy to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—

(1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or

(2) as a consultant to any employee benefit plan,

during or for five years after such conviction or after the end of such imprisonment, whichever is the later, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to

in paragraph (1) or (2) would not be contrary to the purposes of this title. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No person shall knowingly permit any other person to serve in any capacity referred to in paragraph (1) or (2) in violation of this subsection. Notwithstanding the preceing provisions of this subsection, no corporation or partnership will be precluded from acting as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee, of any employee benefit plan or as a consultant to any employee benefit plan without a notice, hearing, and determination by such Board of Parole that such service would be inconsistent with the intention of this section.

(b) Penalty. Any person who intentionally violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) Definitions. For the purposes of this section:

(1) A person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event.

(2) The term "consultant" means any person who, for compensation, advises or represents an employee benefit plan or who provides other assistance to such plan, concerning the establishment or operation of such plan.

(3) A period of parole shall not be considered as part of a period of imprisonment.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 411, 88 Stat. 887.)

APPENDIX Y

29 U.S.C. § 1112. Bonding

(a) Requisite bonding of plan officials. Every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan (hereafter in this section referred to as "plan official") shall be bonded as provided in this section; except that—

(1) where such plan is one under which the only assets from which benefits are paid are the general assets of a union or of an employer, the administrator, officers, and employees of such plan shall be exempt from the bonding requirements of this section, and

(2) no bond shall be required of a fiduciary (or of any director, officer, or employee of such fiduciary) if such fiduciary—

(A) is a corporation organized and doing business under the laws of the United States or of any State;

(B) is authorized under such laws to exercise trust powers or to conduct an insurance business;

(C) is subject to supervision or examination by Federal or State authority; and

(D) has at all times a combined capital and surplus in excess of such a minimum amount as may be established by regulations issued by the Secretary, which amount shall be at least $1,000,000. Paragraph (2) shall apply to a bank or other financial institution which is authorized to exercise trust powers and the deposits of which are not insured by the Federal Deposit Insurance Corporation, only if such bank or institution meets bonding or similar requirements under State law which the Secretary determines are at least equivalent to those imposed on banks by Federal law.

The amount of such bond shall be fixed at the beginning of each fiscal year of the plan. Such amount shall be not less than 10 per centum of the amount of funds handled. In no case shall such bond be less than $1,000 nor more than $500,000, except that the Secretary, after due notice and opportunity for hearing to all interested parties, and after consideration of the record, may prescribe an amount in excess of $500,000, subject to the 10 per centum limitation of the preceding sentence. For purposes of fixing the amount of such bond, the amount of funds handled shall be determined by the funds handled by the person, group, or class to be covered by such bond and by their predecessor or predecessors, if any, during the preceding reporting year, or if the plan has no preceing reporting year, the amount of funds to be handled during the current reporting year by such person, group, or class, estimated as provided in regulations of the Secretary. Such bond shall provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of the plan official, directly or through connivance with others. Any bond shall have as surety thereon a corporate surety company which is an acceptable surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to sections 6 through 13 of title 6, United States Code [6 USCS §§ 6-13]. Any bond shall be in a form or of a type approved by the Secretary, including individual bonds or schedule or blanket forms of bonds which cover a group or class.

(b) Unlawful acts. It shall be unlawful for any plan official to whom subsection (a) applies, to receive, handle, disburse, or otherwise exercise custody or control of any of the funds or other property of any employee benefit plan, without being bonded as required by subsection (a) and it shall be unlawful for any plan official of such plan, or any other person having authority to direct the performance of such functions, to permit such functions, or any of them, to be performed by any plan of-

ficial, with respect to whom the requirements of subsection (a) have not been met.

(c) Conflict of interest prohibited in procuring bonds. It shall be unlawful for any person to procure any bond required by subsection (a) from any surety or other company or through any agent or broker in whose business operations such plan or any party in interest in such plan has any control or significant financial interest, direct or indirect.

(d) Exclusiveness of statutory basis for bonding requirement for persons handling funds or other property of employee benefit plans. Nothing in any other provision of law shall require any person, required to be bonded as provided in subsection (a) because he handles funds or other property of an employee benefit plan, to be bonded insofar as the handling by such person of the funds or other property of such plan is concerned.

(e) Regulations. The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section including exempting a plan from the requirements of this section where he finds that (1) other bonding arrangements or (2) the overall financial condition of the plan would be adequate to protect the interests of the beneficiaries and participants. When, in the opinion of the Secretary, the administrator of a plan offers adequate evidence of the financial responsibility of the plan, or that other bonding arrangements would provide adequate protection of the beneficiaries and participants, he may exempt such plan from the requirements of this section.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 412, 88 Stat. 888.)

APPENDIX Z

29 U.S.C. §1113. Limitation of actions

[(a)] No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 413, 88 Stat. 889.)

APPENDIX AA

29 U.S.C. §1114. Effective date and application

(a) Except as provided in subsections (b), (c), and (d), this part shall take effect on January 1, 1975.

(b) (1) The provisions of this part authorizing the Secretary to promulgate regulations shall take effect on the date of enactment of this Act [enacted Sept. 2, 1974].

(2) Upon application of a plan, the Secretary may postpone until not later than January 1, 1976, the applicability of any provision of sections 402 [29 USCS § 1102], 403 [29 USCS § 1103] (other than 403(c) [29 USCS § 1103(c)], 405 [29 USCS § 1105] (other than 405(a) and (d) [29 USCS § 1105(a) and (d)]), and 410(a) [29 USCS § 1110(a)], as it applies to any plan in existence on the date of enactment of this Act [enacted Sept. 2, 1974] if he determines such postponement is (A) necessary to amend the instrument establishing the plan under which the plan is maintained and (B) not adverse to the interest of participants and beneficiaries.

(3) This part shall take effect on the date of enactment of this Act [enacted Sept. 2, 1974] with respect to a plan which terminates after June 30, 1974, and before January 1, 1975, and to which at the time of termination section 4021 [29 USCS § 1321] applies.

(c) Section 406 [29 USCS § 1106] and 407(a) [29 USCS § 1107(a)] (relating to prohibited transactions) shall not apply—

(1) until June 30, 1984, to a loan of money or other extension of credit between a plan and a party in interest under a binding contract in effect on July 1, 1974 (or pursuant to renewals of such a contract), if such loan or other extension of credit remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be, and if the execution of the contract, the making of the

loan, or the extension of credit was not, at the time of such execution, making, or extension, a prohibited transaction (within the meaning of section 503(b) of the Internal Revenue Code of 1954 [26 USCS § 503(b)] or the corresponding provisions of prior law);

(2) until June 30, 1984, to a lease or joint use of property involving the plan and a party in interest pursuant to a binding contract in effect on July 1, 1974 (or pursuant to renewals of such a contract), if such lease or joint use remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and if the execution of the contract was not, at the time of such execution, a prohibited transaction (within the meaning of section 503(b) of the Internal Revenue Code of 1954 [26 USCS § 503(b)]), or the corresponding provision of prior law;

(3) until June 30, 1984, to the sale, exchange, or other disposition of property described in paragraph (2) between a plan and a party in interest if—

(A) in the case of a sale, exchange, or other disposition of the property by the plan to the party in interest, the plan receives an amount which is not less than the fair market value of the property at the time of such disposition; and

(B) in the case of the acquisition of the property by the plan, the plan pays an amount which is not in excess of the fair market value of the property at the time of such acquisition;

(4) Until June 30, 1977, to the provision of services, to which paragraphs (1), (2), and (3) do not apply between a plan and a party in interest—

(A) under a binding contract in effect on July 1, 1974 (or pursuant to renewals of such contract), or

(B) if the party in interest ordinarily and customarily furnished such services on June 30, 1974, if such pro-

vision of services remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and if such provision of services was not, at the time of such provision, a prohibited transaction (within the meaning of section 503(b) of the Internal Revenue Code of 1954 [26 USCS § 503(b)]) or the corresponding provisions of prior law; or

(5) the sale, exchange, or other disposition of property which is owned by a plan on June 30, 1974, and all times thereafter, to a party in interest, if such plan is required to dispose of such property in order to comply with the provisions of section 407(a) [29 USCS § 1107(a)] (relating to the prohibition against holding excess employer securities and employer real property), and if the plan receives not less than adequate consideration.

(d) Any election, or failure to elect, by a disqualified person under section 2003(c)(1)(B) of this Act [26 USCS § 4975 note] shall be treated for purposes of this part (but not for purposes of section 514 [29 USCS § 1144]) as an act or omission occurring before the effective date of this part.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 414, 88 Stat. 889.)

APPENDIX BB

29 U.S.C.§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

APPENDIX CC

29 U.S.C. § 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opprtunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 5, § 503, 88 Stat. 893.)

APPENDIX DD

28 U.S.C. §1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or law of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questiions presented;

(3) By certiorari at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, § 1, 62 Stat. 928.)

Supreme Court, U.S.
FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-496

In The

Supreme Court of the United States

October Term, 1988

PHILIP A. YOUNG, MAX GOSSARD, ROBERT L. BROEKER, MARK BOKELMAN, JAMES ROHLF, OLIVER E. MOLDESTAD, LARRY GODEJAHN, EMERY PISTULKA and ARTHUR REINSMA,

Petitioners,

v.

STANDARD OIL (INDIANA) and AMOCO OIL COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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39 pp

QUESTIONS PRESENTED

1. Whether there is no sound reason to hold this case for *Firestone Tire & Rubber Co. v. Bruch,* No. 87-1054, *cert. granted,* 56 U.S.L.W. 3682 (U.S. 1988) because:

   (a) the issue in *Firestone* is the proper standard for judicial review under the Employee Retirement Income Security Act of 1974 ("ERISA") of the plan fiduciary's interpretation of ambiguous or uncertain plan provisions;

   (b) this case does not present such an issue but rather involves plan provisions which explicitly disallow plan benefits on the undisputed facts presented; and

   (c) in contrast to *Firestone,* petitioners in this case must invalidate or avoid the applicable plan provisions in order to recover benefits.

2. Whether, in circumstances where the petitioner plan participants had no accrued or vested rights to future benefits under the terms of the existing benefit plan, the respondent employer was prevented by ERISA or a "federal common law of contracts" from establishing a new benefit plan prescribing a different eligibility condition for any future benefits.

3. Whether, in circumstances where the terms of a benefit plan do not contravene any statutory or regulatory requirement, ERISA permits judicial review of the plan terms for substantive reasonableness.

4. Whether, under ERISA, plan participants may recover benefits contrary to explicit plan provisions on the basis of "procedural" statutory violations that caused no prejudice to any benefit right or other substantive harm.

RULE 28.1 LISTING

At the time this action was commenced, respondent Amoco Oil Company was a wholly owned subsidiary of respondent Standard Oil (Indiana). In 1985, Standard Oil (Indiana)'s name was changed to Amoco Corporation and Amoco Oil Company became a wholly owned subsidiary of Amoco Company, which is, in turn, a wholly owned subsidiary of Amoco Corporation. Amoco Corporation has no parent corporation. Non-wholly owned subsidiaries or affiliates of Amoco Corporation, including subsidiaries and affiliates of wholly owned subsidiaries, include the following:

Southridge Park Associates
OK Tedi Mining Limited
Bennett/South Shore Association
Chicago Equity Fund 1985 Partnership
5836 W. Washington LTD. Partnership
33 North Lorel Limited Partnership
Midwest Club
Panorama Office Park II
Tangley Oaks
Gene-Trak Systems, Inc.
Intelligenetics, Incorporated
Solare S.P.A.
Trout Lake Golf and Country Club
Detour Lake Mining Project
Rhodiaco Industries Quimicas Ltda
Amoco Fina N.V.
A. G. Intl. Chemical Company, Inc.
Singapore Petroleum Company, PTE., LTD.
Singapore Refining Company PTE., LTD.

Cliffe Storage Limited
Kharg Chemical Company Limited
Petroleum Storage Limited
China American Petrochemical Company, LTD.
Samsung Petrochemical Company, LTD.
ACM Services, Inc.
Atlas Supply Company
Fertilizers of Trinidad & Tobago LTD.
Frontier Pipeline Company
Raven Ridge Pipeline Company
Chicap Pipe Line Company
Wyco Pipe Line Company
Ekma Oil Company
Gulf of Suez Petroleum Company
Rodeis Oil Company
Torsina Oil Company
Iran Pan American Oil Company
Sharjam LPG Company, Limited
Aimsa S.A. DE C.V.
Amoco Exploration Zaire S.P.R.L.
H&R Industries
S.I. Tech. Inc.

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JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") was entered on June 23, 1988. The Petition seeks to invoke the jurisdiction of this Court to review the judgment under 28 U.S.C. § 1254(1). It is unclear whether the Petition meets the 90-day jurisdictional limitation provided by 28 U.S.C. § 2101(c). The only affidavit of mailing served by counsel for petitioners on the respondents was prepared and served in advance of the mailing of the petition and does not comply with the requirements of Supreme Court Rule 28.2. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* at pp. 305-06 (6th ed. 1986).

———o———

STATEMENT OF THE CASE

A. Proceedings Below.

This action was commenced on October 11, 1983 by four of the petitioners in the Circuit Court for Madison County, Indiana, alleging a wrongful denial of severance benefits under a benefit plan maintained by respondents Amoco Oil Company ("Amoco") and Standard Oil (Indiana) ("Standard"). Amoco and Standard removed the action to the United States District Court for the Southern District of Indiana on the ground that the severance plan was a welfare benefit plan within the coverage of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and, therefore, the claims alleged necessarily arose under that federal statute.[1] Petitioners thereafter filed a second amended complaint which alleged claims under ERISA and added the other petitioners as plaintiffs.

On February 28, 1986, after extensive discovery by the parties, Amoco and Standard moved for summary

[1] *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

judgment on all claims alleged by the second amended complaint. After five extensions of time granted by the District Court, petitioners filed their response in opposition to the motion on October 14, 1986. The District Court had an extensive evidentiary record before it on the motion, consisting primarily of affidavits, excerpts from discovery depositions and deposition exhibits filed by the parties pursuant to S.D. IND. R. 15(e). After a hearing on the motion on April 16, 1987, the District Court entered an order setting forth extensive determinations of uncontested facts and conclusions of law, and granted summary judgment in favor of Amoco and Standard. (Pet. App. at A1 *et seq.*) On appeal, the Seventh Circuit affirmed the District Court's judgment in all respects. (Pet. App. at A25 *et seq.*)

B. Statement Of Facts

For a number of years prior to 1983, Amoco owned and operated a Fertilizer & Pesticides Division (the "F & P Division"). The F & P Division had over 800 employees and facilities in 14 States, including several fertilizer processing plants, ammonia terminals and soil laboratories, Torch Chemical (which operated agricultural chemical distributorships), Trekker Chemical (which formulated and manufactured specialty products) and more than 350 retail fertilizer outlets.

Each of the retail outlets in the F & P Division was managed by an employee called a "crop guide manager." Some of the retail outlets also had a second full-time employee called a "helper" or "secondman." Petitioners were each employed in a retail outlet, either as a crop guide manager or helper, in various locations in Indiana, Minnesota and Ohio.

Because of an unsatisfactory return on investment, due principally to changing supply and market conditions, Amoco decided in 1982 to try to divest the F & P Division. An initial effort to sell the Division as a going concern through an investment banking firm was unsuccessful. Thereafter, in July, 1982, Amoco's management considered and approved a proposal for Amoco to divest the F & P Division and withdraw from the business. The proposal in order of priority was (1) to try to sell the business as an entity; (2) to try to sell the business in segments; and (3) if and to the extent that sales were not possible, to shut down the operations. Standard (Amoco's corporate parent) approved the divestiture proposal on July 20, 1982.

Over a period of several years prior to 1981, Standard and Amoco had implemented a number of different severance policies. Effective April 1, 1981, Standard adopted for itself and its subsidiaries the Severance Allowance Policy of Standard Oil Company and Participating Companies (the "1981 Severance Policy"). The 1981 Severance Policy provided that it would apply only when a company's "management elects to apply [it] to a particular employee-reduction situation." It also conferred authority on management to designate categories of employees who would not be eligible to participate in situations where the Policy was otherwise implemented. The 1981 Severance Policy further provided that:

> 3. Even though the Policy may be in effect for a particular employee-reduction situation, an employee will not qualify for a severance allowance under the following circumstances:
>
> . . . .

g. Sale of facilities when the new owner offers to the employee comparable employment as determined by the Company.

(Pet. App. at A5)

During the spring of 1982, when divestiture of the F & P Division was initially being considered, Amoco's management also began considering the possible implementation of the 1981 Severance Policy in connection with such a divestiture. The cost of doing so was estimated under several alternatives, including the potential exclusion of employees at the retail outlets (pursuant to management authority to designate categories of eligible employees under the Policy).

On August 2, 1982, after Standard's approval of the final Amoco proposal with respect to the Division (which included selling and shutting down the Division in segments, if sale as an entity was not possible), Amoco sought permission from Standard to create a different severance policy to apply to the F & P divestiture:

> The Severance Allowance Policy currently in effect states that severance will not be payable if "the new owner offers to the employees comparable employment as determined by the company." Because of the nature of the fertilizer and pesticides business, it is unlikely that potential buyers would provide wages or the level of benefits comparable to those presently offered by Amoco Oil. Under these conditions, all present Fertilizer & Pesticides employees would probably qualify for severance benefits, regardless of employment opportunities with the new owners. Such payments would amount to approximately $6,200,000. In addition, it is conceivable that many different new owners will be involved, making it difficult to determine comparable employment and inviting possible litigation in the determination of comparable employment.

Acomo Oil recommends that a special Severance Allowance Policy be adopted for the Fertilizer & Pesticides divestiture as follows:

1. Any present Amoco employee who is offered a position with a new owner will forfeit severance consideration, regardless of salary, benefits, or position.
2. Severance payments will be given to current employees who are not offered employment with the new owner, and to employees when facilities are not sold and operations are discontinued.
3. Consent Retirement will be available to current employees with 20 or more years of Retirement Plan participation even if they do not qualify for a severance allowance.

(Pet. App. at A6-A7)

After Standard agreed with this recommendation to adopt a special severance policy for the F & P divestiture, the Severance Allowance Policy of the Fertilizer & Pesticides Division of Amoco Oil Company ("F & P Severance Policy") was created, effective August 1, 1982. It provided, *inter alia*, that:

B. Qualifications—Severance Allowance
   1. An employee will qualify for a severance allowance provided all of the following conditions are met:
      a. The employee becomes unemployed because:
         (1) The Company does not sell the facility and the operations are discontinued, or
         (2) The facility is sold by the Company but the buyer does not offer employment to the individuals.

. . . .

2. An employee will not qualify for a severance allowance under the following circumstances:
   a. Offered a job by the new owner of the facility.

(Pet. App. at A7)

Amoco then promptly informed the F & P employees, both orally and in writing, of the anticipated divestiture and of the conditions under which severance would be paid. Amoco said in a letter dated August 3, 1982, addressed to all employees of the Division, that:

> Amoco Oil Company will announce publicly tomorrow that it plans to offer for sale its entire fertilizer and pesticides marketing and supply system . . . .
> . . . Barring sale of the system as a whole, Amoco plans to sell the system in regional segments . . . .
> If the system is sold as a whole or in regional segments, current employees may be offered employment by the purchaser. Should such sales not occur or employees are not offered employment by the new owners, Amoco will provide severance and if eligible, retirement benefits to regular full-time employees who must leave the company.

(Pet. App. at A8) Amoco also distributed to its employees a press release, dated August 4, 1982, which stated in part: "Amoco will provide severance and appropriate retirement benefits to regular, full-time employees who are not offered employment by the new owners and must leave the company because of the sale." (*Id.*)

In addition, in August, 1982, the Division employees were provided copies of "Questions and Answers About Fertilizer and Pesticides Sale." This document stated, *inter alia:*

3. Does this mean that the Fertilizer & Pesticides facilities will be shut down?

Answer: Finding a suitable purchaser for a business this large requires a lot of time and effort. Active, profitable fertilizer and pesticides operations will not be shut down at this time. Ultimately, we plan to get out of the business.

. . . .

6. Should a purchaser for the system, or parts of it, be found and the purchaser offered Amoco Oil employees jobs, would Amoco Oil provide the regular full-time employees with severance?

   Answer: If a purchaser is found and elects to hire Amoco Oil's current regular, full-time employees, they would not be eligible for severance pay.

7. If I reject a job offer from the new owner, will I forfeit my severence benefits?

   Answer: Yes. Severance benefits will be available only to regular, full-time employees, who are not offered a job.

(Pet. App. at A7-A8) Amoco also held meetings with the F & P employees in early August, 1982 to discuss the divestiture and the conditions under which severance would be paid. The employees were told at these meetings that severance would not be paid if they were offered employment by any purchaser of the facilities where they worked.

After further efforts to sell the Division as an entity were unsuccessful, Amoco began selling and shutting down the Division in regional segments. In early 1983, Amoco (1) sold the processing plant in Rochelle, Georgia to Chemical Enterprises, Inc. and sold or shut down the retail outlets in Georgia; (2) sold the Brunswick, Missouri processing plant and all retail outlets in Missouri and Kansas to SCF, Inc.; and (3) sold the processing plant at

Mt. Carmel, Illinois and the retail outlets served by that facility to Triple T, Inc.

Amoco thereafter received an offer for the remainder of the F & P Division from The Scoular Company and, on June 15, 1983, entered into a purchase and sale agreement with Scoular and The Cropmate Company (a subsidiary created by Scoular). The sale agreement provided, *inter alia*, that the sale would be closed on August 31, 1983, and that before the closing Cropmate would provide Amoco with a list of those F & P employees to whom Cropmate would offer employment. (Pet. App. at A9-A10)

By letter dated June 20, 1983, Amoco told the remaining F & P employees of the sale agreement with Scoular and Cropmate, that the sale closing would be August 31, 1983, and that "the effective date of employment for those employees who are offered and accept employment" with Cropmate would be September 1, 1983. (Pet. App. at A11) In July, 1983, Amoco held termination benefit meetings with the remaining F & P employees. The employees were again told that severance benefits would not be paid to employees who were offered a job. The employees were also told how severance benefits for eligible employees would be computed according to the benefit schedule set forth in the F & P Severance Policy. (Pet. App. at A12)

Scoular's original intention, as communicated to Amoco, was that it would offer employment to most of the F & P employees, and that it would also offer most existing crop guide managers the opportunity to purchase from and lease back to Cropmate the retail outlets where they were presently employed. After the purchase and

sale agreement was executed, Cropmate reviewed the current crop guide managers to determine which ones Cropmate wanted to be part of the new organization. Those crop guide managers and existing helpers that Cropmate wanted to become crop guide managers for Cropmate were then invited to meetings in July, 1983.

Petitioners made numerous allegations regarding what was said at these meetings about employment with Cropmate and the proposed terms of the retail outlet purchase and leaseback. In view of the undisputed facts regarding petitioners' employment with Cropmate after the sale, the courts below held the factual disputes regarding what was said at these meetings to be immaterial to the legal issues presented. (Pet. App. at A11-A12, A40-A41)

The sale closing between Amoco, Scoular and Cropmate was held on August 31, 1983. All of the petitioners except Moldstad became employees of Cropmate on September 1, 1983, in the same positions, at the same salary, and without any agreement to purchase and lease back a retail outlet as a condition to that employment. (Pet. App. at A12-A13) Moldstad refused to work for Cropmate. (Pet. at 7)[2]

Cropmate terminated no one who did not want to buy a retail outlet as of September 1, 1983. Petitioners claimed,

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[2]Six of the petitioners were still employed by Cropmate when they were deposed in this action. Another testified that he quit his job with Cropmate after two weeks to accept other employment. The other testified that he left employment with Cropmate five months later when Cropmate found a "potential" purchaser for his retail outlet and that he returned to full-time farming as he had already planned to do. After beginning employment with Cropmate, three of the petitioners later decided to purchase and lease back their retail outlets (in November, 1983 and February and April, 1984, respectively). (Pet. App. at A12-A13)

however, and Amoco and Standard accepted as true for purposes of their summary judgment motion, that a crop guide manager who did not purchase and lease back his retail outlet was at risk that Cropmate would later sell it to another buyer who might, in turn, decide not to retain the existing manager.[3]

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REASONS FOR DENYING THE WRIT

The Petition claims that this case "raises many of the same basic questions under ERISA concerning the standard of review for 'welfare benefits' " that are before this Court in *Firestone Tire & Rubber Co. v. Bruch,* No. 87-1054, *cert. granted,* 56 U.S.L.W. 3682 (U.S. 1988). (Pet. at 11) That is not so. This case and *Firestone* both involve a denial of severance benefits in a "sale of business" situation where the plan participants were employed by the purchaser of the business. However, the similarity between this case and *Firestone* begins and ends at that point. Regardless how this Court decides the issue presented in *Firestone,* that would not affect the result here.

Firestone presents the issue whether the plan participants are entitled to severance *under the terms of the benefit plan* and the proper standard for judicial review of that issue. In this case, by contrast, petitioners are not eligible for benefits unless they may *override* the terms of the benefit plan—*e.g.*, unless they may challenge

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[3]Of the 265 retail outlets purchased by Cropmate from Amoco, no more than six were resold to third parties other than employees.

The extensive undisputed facts regarding the severance benefit claims petitioners filed with Amoco and the plan administrator's and fiduciary's processing of those claims are accurately summarized in the District Court's opinion and will not be repeated here. (See Pet. App. at A13-A16)

the "job offer" term of the F & P Severance Policy as substantively "unreasonable" or prevail on claims that ERISA did not permit the establishment of the F & P Severance Policy in place of the 1981 Severance Policy to govern this divestiture. The Seventh Circuit's decision on these quite different issues is correct, conforms with the decisions of other circuits, and does not warrant further review.

I. This Case Will Not Be Affected By And Should Not Be Held For The Court's Decision In Firestone v. Bruch.

ERISA creates a cause of action for a plan participant or beneficiary "to recover benefits due to him *under the terms of his plan . . . .*" 29 U.S.C. § 1132(a)(1)(B) (emphasis added). In *Firestone Tire & Rubber Co. v. Bruch,* No. 87-1054, this Court has granted *certiorari* to consider the proper standard for judicial review under that section. Specifically, the issue in *Firestone* is the proper standard for review of the plan fiduciary's denial of benefits based upon an interpretation of ambiguous or uncertain plan provisions. In contrast to other circuits which have applied a deferential "arbitrary and capricious" standard of review, the Third Circuit in *Firestone* held that ordinary principles "governing construction of contracts" should apply. *Bruch v. Firestone Tire and Rubber Co.,* 828 F.2d 134, 138, 145 (3d Cir. 1987). Although the Seventh Circuit here, following its earlier precedent, said that the "arbitrary and capricious" standard governs review of denials of benefit claims under ERISA, a contrary conclusion by this Court in *Firestone* would not alter the result in this case.

Firestone, as well as many other circuit court of appeals decisions involving severance benefit claims, all in-

volved benefit plans which generally provided that severance would be paid when employment with the company was terminated; those plans *did not* specifically address the sale-of-business situation and make clear whether benefits would be paid if a participant continued to be employed by a purchaser of the business. *E.g., Bruch v. Firestone,* 828 F.2d at 146; *Simmons v. Diamond Shamrock Corp.,* 844 F.2d 517, 522-23 (8th Cir. 1988); *Adcock v. Firestone Tire & Rubber Co.,* 822 F.2d 623, 624, 626-27 (6th Cir. 1987); *Blakeman v. Mead Containers,* 779 F.2d 1146, 1148-49 (6th Cir. 1985); *Holland v. Burlington Indus., Inc.,* 772 F.2d 1140, 1144 n.2, 1149 (4th Cir. 1985), *aff'd,* 477 U.S. 901, *cert. denied,* 477 U.S. 903 (1986); *Jung v. FMC Corp.,* 755 F.2d 708, 712-13 (9th Cir. 1985). Thus, the issue in those cases was whether the fiduciary had erroneously *interpreted* the plan in determining that benefits would not be paid to employees who continued their employment with the new owner of the business. In such situations involving uncertain or ambiguous plan provisions, the difference between an "arbitrary and capricious" standard and a standard less deferential to the plan fiduciary's interpretation of the plan may well lead to a different result.

However, no such issue is fairly presented in this case. The F & P Severance Policy here *explicitly* addresses the "sale-of-business" situation and *explicitly* provides that an employee who is "offered a job by the new owner of the facility" is ineligible for benefits. (Pet. App. at A7) There is no ambiguity or uncertainty in that language and its plain meaning cannot be avoided regardless of the standard of review applicable to claims to recover, in the words of the statute, "benefits due . . . *under the terms of* [the] plan . . . ." 29 U.S.C. § 1132(a)(1)(B)

(emphasis added). Indeed, the District Court expressly stated that "no issue of plan 'interpretation' is presented here; the F & P Severance Policy expressly provides that employees are not eligible for severance if they are '[o]ffered a job by the new owner of the facility.'" (Pet. App. at A22) While it does not repeat that statement verbatim, the Seventh Circuit's opinion also shows that no issue of plan interpretation is presented here. (*See id.* at A40-A42)[4]

Rather, although the Petition frequently confuses or obscures the issues in an effort to relate this case to *Firestone*, the question in this case is whether petitioners may *avoid* or *override* the terms of the benefit plan. As they repeatedly argued in the courts below, and as is demonstrated by those courts' opinions, petitioners could recover benefits only by prevailing on claims that:

> (a) ERISA or a "federal common law of contracts" prevents an employer from amending a benefit plan with respect to unaccrued and contingent future benefits;

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[4]Petitioners claim there is a "disputed" issue of fact "whether any employment offers were made by Cropmate." (Pet. at 23) That contention is incredible given the undisputed facts that eight of them were *employed* by Cropmate immediately following the sale (in the same jobs, at the same salary, and without any agreement to purchase and lease back their retail facilities) and the ninth admits he refused to work for Cropmate. So far as petitioners mean by that contention that they were not offered "secure" or "permanent" employment with Cropmate, this is not a disputed "fact" issue but rather, as the Seventh Circuit held, an attack on the substantive reasonableness of the terms of the severance policy. *See* Part III, *infra*. And even if there were some disputed issue of fact, *Firestone v. Bruch* does not, as the Third Circuit noted, involve the issue of the proper standard of review under ERISA of "a determination of fact by a plan administrator." 828 F.2d at 144 n.9.

(b) ERISA permits judicial review of the terms of welfare benefit plans for substantive "unreasonableness" or "arbitrariness"; or

(c) plan participants may recover benefits contrary to the terms of the plan based on "procedural" ERISA violations which caused no prejudice to any benefit right or any other substantive harm.

None of these issues was decided or is presented in *Firestone v. Bruch*. The Seventh Circuit decided each of them correctly and in conformity with other circuit court of appeals decisions, and none warrants further review by this Court.

II. ERISA Does Not Prevent An Employer From Amending A Benefit Plan With Respect To Unaccrued And Contingent Future Benefits.

Although it is now confusingly intertwined with other issues in the Petition, the core of petitioners' claim in the District Court was simply this: (1) their jobs with Cropmate were not secure unless they agreed to purchase and lease back their retail outlets; (2) they therefore (allegedly) would have qualified for benefits under the 1981 Severance Policy's provision that severance would be paid to employees who were not offered "comparable employment"; and (3) respondents acted illegally in establishing the F & P Severance Policy to delete the condition that the offered employment be "comparable."[5]

It is undisputed that the F & P Severance Policy was established in August, 1982, long before the sale of the portion of the Division to Scoular and Cropmate and more than a year before petitioners' employment with Amoco

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[5]No such "plan amendment" issue was presented or decided in *Bruch v. Firestone*, as the Third Circuit specifically noted. *See* 828 F.2d at 144 n.11.

was terminated. When that new Policy was established, petitioners were not entitled to benefits under the plain terms of the 1981 Severance Policy, and it was unknown whether they would in the future qualify for benefits under the terms of either the 1981 Policy or the F & P Policy. In particular, no one knew whether the F & P Division would be sold as an entity, sold in segments, shut down or some combination of the latter two possibilities.[6]

It is equally clear that ERISA permitted respondents to establish the F & P Policy with its altered criterion for any future severance benefits. There is no basis in the statute or other law for holding the new Policy retroactively invalid based on events which occurred thereafter and particular facts pertaining to these particular employees' jobs with Cropmate.

As the courts below noted, ERISA divides employee benefits into two categories: (1) "retirement" benefits; and (2) "welfare" benefits, such as medical and disability, and including severance benefits of the type at issue here. 29 U.S.C. § 1002(1)-(2); 29 C.F.R. § 2510.3-2. For most retirement benefits, ERISA imposes minimum requirements for the accrual, vesting and non-forfeitability of benefits under pension plans, as well as for the funding of such plans. 29 U.S.C. §§ 1051-1061, 1081-1086. However, Congress expressly *exempted* welfare benefits from these accrual, vesting and funding requirements. 29 U.S.C. §§ 1051, 1081(a)(1). Thus, welfare benefits (as well as so-called "ancillary" retirement benefits such as early retirement) may be made entirely "contingent" and need not be accrued, vested and made non-forfeitable. Accordingly, an employee's inchoate "interest" in such contingent

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[6]Accordingly, petitioners' assertion that the benefit plan "changes" here were "retroactive" (Pet. at 28) is simply wrong on the undisputed facts of this case.

benefits may be lost if his employment is terminated or the benefit plan is amended or terminated before he becomes eligible under the plan's terms for the payment of such benefits. *E.g., Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *Bencivenga v. Western Pa. Teamsters and Employers Pension Fund*, 763 F.2d 574 (3d Cir. 1985). Petitioners' various contentions that Amoco and Standard acted illegally in creating the F & P Severance Policy to govern the divestiture simply attempt to extend to welfare benefit plans the sorts of accrual, vesting and non-forfeitability requirements which Congress determined to require only of retirement plans.

Petitioners' primary contention is that Amoco and Standard breached a "fiduciary duty" in changing the eligibility condition for future benefits. However, an employer does *not* act in a fiduciary capacity or owe a fiduciary duty in creating, amending or terminating a benefit plan. As the Fourth Circuit held in rejecting claims that the employer had breached a fiduciary duty by amending plans to reduce severance and early retirement benefits for employees who continued to work for the purchaser in a sale-of-business context, "[t]he accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments. The Act was not designed to prohibit modification of these ancillary benefits." *Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 724 F.2d at 410. Accordingly, although the employer in that case, as in this one, was the plan fiduciary:

> National, in its capacity as a fiduciary, did not violate ERISA. Congress authorized an employer to administer its pension plan, and in the discharge of its duties with respect to the plan, the employer must satisfy the exacting fiduciary standards imposed by

> ERISA. *Congress, however, has not prohibited an employer who is also a fiduciary from exercising the right accorded other employers to renegotiate or amend, as the case may be, unfunded contingent benefits payable before normal retirement age.* The changes, accomplished in this manner, are not to be reviewed by fiduciary standards.

Id. at 410-11 (emphasis added).

Other decisions by the circuit courts of appeals, including the Seventh Circuit in this case (Pet. App. at A36-A37), have uniformly followed the decision in *Sutton*. *E.g., Anderson v. John Morrell & Co.*, 830 F.2d 872, 875-76 (8th Cir. 1987); *West v. Greyhound Corp.*, 813 F.2d 951, 954-55 (9th Cir. 1987); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1893 (1987); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986); *United Ind. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1268-69 (7th Cir. 1985). *See also Dougherty v. Chrysler Motors Corp.*, 840 F.2d 2, 3-4 (6th Cir. 1988); *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988). As the Eleventh Circuit reiterated in *Phillips v. Amoco Oil:*

> ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued. Moreover, . . . ERISA . . . envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer. ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets.

799 F.2d at 1471.

If the contrary were true, an employer could *never* amend or terminate a benefit plan to reduce or eliminate contingent future benefits. Indeed, every business decision arguably affecting future benefits would have to be

made solely in the interest of plan participants and beneficiaries. *See Dhayer v. Weirton Steel Div. of Nat. Steel Corp.*, 571 F. Supp. 316, 328-29 (N.D. W. Va.), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). There is no basis in the statute for courts to pick and choose among plan amendments and terminations under a "fiduciary" theory, upholding some and disallowing others. Where fiduciary duties are owed under ERISA, *all* actions must be taken "*solely* in the interest of the participants and beneficiaries . . . ." 29 U.S.C. § 1104(1) (emphasis added). If lines are to be drawn in this area and particular types of amendments and terminations for future benefits to be disallowed, that is a task for Congress.

The Petition seeks to confuse the legal issues, arguing in favor of the Third Circuit's decision in *Firestone* and for a "good faith" rather than an "arbitrary and capricious" standard. (*See, e.g.*, Pet. at 15-17) As stated above, however, whether an "arbitrary and capricious," "good faith" or any other standard is the proper one, that issue involves only judicial review of a denial of benefits *under the terms of* a plan. It is simply inapplicable to the issue whether an employer may *amend* a plan with respect to future benefits.

For example, petitioners assert that one factor to be considered under the supposed "good faith" test is "[w]hat has been the past practices of the employer in interpreting and implementing the benefit plan." (Pet. at 16) While prior practices and interpretations of a given plan are relevant to judicial review of a denial of benefits under that *same* plan (under either an "arbitrary and capricious" or a more stringent standard for review, *compare Bruch v. Firestone*, 828 F.2d at 147 *with, e.g., Sim-*

mons v. Diamond Shamrock, 844 F.2d at 523; *Adcock v. Firestone Tire*, 822 F.2d at 626), it is patently irrelevant to the issues of the legality of *amending* the plan or an entitlement to benefits under the plan *as amended*. The very point of a plan amendment is to *change* the terms under which benefits will be provided in the future.[7]

Petitioners also assert that Amoco and Standard were barred by a "federal common law" of contracts and/or estoppel from establishing the F & P Severance Policy in place of the 1981 Severance Policy. (*See* Pet. at 19-20) As shown by petitioners' leading (but consistently miscited) authority for that proposition, *Adcock v. Firestone Tire & Rubber Co.*, 616 F. Supp. 409 (M.D. Tenn. 1985), *rev'd in relevant part and aff'd in part*, 822 F.2d 623 (6th Cir. 1987), that contention, like the discredited "fiduciary" theory, seeks to impose on welfare benefits the vesting and accural requirements which Congress decided to require only for core retirement benefits. *See* 616 F. Supp.

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[7]Petitioners assert that "[n]umerous circuits have expanded the good faith/bad faith issue not only in the area of administration of plans but amendments and terminations thereof," but *none* of the cases cited to support that proposition in fact does so. (See Pet. at 16 and cases cited) Some cases cited at other points in the Petition did involve plan amendments but are inapposite here because they involved both pension plans and amendments *promulgated by plan fiduciaries acting in their capacities as such*. E.g., *Argo v. Joint Plumbing Industry Bd.*, 623 F.2d 207 (2d Cir. 1980); *Northeast Dept. ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985); *Deak v. Masters, Mates and Pilots Pension Plan*, 821 F.2d 572 (11th Cir. 1987), *cert. denied*, 108 Sup. Ct. 698 (1988). Without noticing that crucial distinction, the court in *Baker v. Lukens Steel Co.*, 793 F.2d 509 (3d Cir. 1986), did apply the analysis in *Argo* to a plan amendment by the employer. However, the result reached in *Baker* is fully consistent with the result in this and the other cases following *Sutton*. *See* 793 F.2d at 513-14.

at 413-19, 423-24.[8] Judicial creation of a "federal common law of contracts" to bar terminations and amendments of welfare benefit plans eliminating or reducing future benefits would contravene both the statutory scheme and the settled rule that "[a]n employer may change such benefits . . . ." *Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). *See Anderson v. John Morrell & Co.*, 830 F.2d 872, 876-77 (8th Cir. 1987); *United Elec., Radio and Mach. Workers v. Amcast Indus. Corp.*, 634 F. Supp. 1135, 1142-43 (S.D. Ohio 1986) (rejecting both "fiduciary" and "federal common law of contracts" theories as inconsistent with the statute); *cf. Dougherty v. Chrysler Motors Corp.*, 840 F.2d 2, 3-4 (6th Cir. 1988) (holding a similar contention inconsistent with the statute and implicity an attempt to assert a state law claim that is preempted by ERISA).

Moreover, petitioners would not be entitled to benefits here even if plan amendments or terminations with respect to unaccrued future benefits *were* controlled by a "federal common law of contracts." The 1981 Severance Policy (like each of the preceding severance policies) provided that:

> The Company reserves the right to amend, modify, suspend, or discontinue the Policy and any such action shall apply to existing as well as future employees.

(Pet. App. at A20) Where this power to amend or abolish is reserved in the plan, there is no basis in "contract law" or "estoppel" for holding that the employer may not exercise it. *Cattin v. General Motors Corp.*, 641 F. Supp.

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[8]On appeal in *Adcock*, the Sixth Circuit reversed this portion of the district court decision on other grounds, stating that if it were to reach the issue on the merits, the "district court's contract analysis" would "likely . . . be reversed . . . ." 822 F.2d at 627 & n.13 (citation omitted).

591, 595-96 (E.D. Mich. 1986); *see also Anderson v. John Morrell & Co.*, 830 F.2d 872, 876-77 (8th Cir. 1987); *In re White Farm Equip. Co.*, 788 F.2d 1186, 1190-93 (6th Cir. 1986).[9]

III. Under ERISA, Plan Participants May Not Challenge Welfare Plan Provisions As Substantively "Unreasonable" or "Arbitrary".

In the courts below, petitioners argued that they should receive severance benefits because their jobs with Cropmate were "temporary" and not sufficiently secure—*i.e.*, if they did not later purchase their retail outlet and lease it back to Cropmate, there was a risk that Cropmate might find another buyer who would in turn decide not to retain the existing crop guide manager. The Petition apparently advances the same contention in the guise of claiming that petitioners were really not "offered jobs" by Cropmate. (The contention is otherwise unintelligible given the undisputed fact that they were *employed* by Cropmate.) Petitioners also advance a similar contention in claiming that judicial review of the denial of severance should consider whether "the sale contract between the seller and purchaser binds the purchaser to offer continued benefits including severance." (Pet. at 17)

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[9]Even apart from this reserved power to amend or abolish the 1981 Severance Policy, petitioners' "contract" contention ignores that there was no unilateral entitlement to severance benefits under that Policy in any event. Rather, benefits under the 1981 Policy depended upon a management decision to implement the policy "for a particular employment reduction situation," and further gave management discretion to designate the eligible categories of employees if the Policy were implemented. (Pet. App. at A5) While the F & P Policy changed the eligibility criterion in the sale-of-facility situation to delete the requirement that the job offered be "comparable," it at the same time guaranteed severance to all employees who were not offered jobs whereas there was no such guarantee under the 1981 Policy.

However, under the express terms of the F & P Severance Policy here, the applicable trigger for benefits is *only* whether the individual employee was "offered a job" by a purchaser of his facility. The Policy's criteria do *not* include an analysis of the relative "security" of a given job, nor the length of time the employee keeps a new job, nor for what reasons an employee might subsequently choose to leave, or be forced to leave, the new job. It contains no requirement that Amoco re-determine a former employee's right to severance benefits if his employment with the purchaser did not endure, or do so if the cause of a subsequent employment termination was not the result of the employee's fault or choice.[10]

In these circumstances, petitioners' "job security" contentions simply amount to a substantive attack on the terms of the severance policy itself, implicitly claiming that it ought to be more "finely tuned" to take such factors into account. However, ERISA does *not* require severance plans to include such additional factors and considerations. The statute simply does "not regulate the

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[10]True, given the "unemployment compensation" purpose of severance pay, windfall gains and losses can occur in individual cases. A particular employee not offered a job by the purchaser of his facility might have alternative employment already arranged by the time of his termination with Amoco, or secure alternative employment promptly thereafter, thus receiving severance pay but not really "needing" it in light of its purpose. By contrast, another employee, although offered a job by the purchaser, might lose the job for any number of reasons and thus have a "need" for severance pay within a short time after the sale. Such possibilities in particular cases notwithstanding, however, Amoco chose and implemented an administratively simple policy that did not require it to police the employees' subsequent employment relationships with other employers or to re-determine severance eligibility based upon future events. Under the F & P Severance Policy, severance benefits are payable or not depending upon a single fact at the time of sale and termination of the employment relationship with Amoco—whether the employee was offered a job by the purchaser.

substantive content of welfare-benefit plans." *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 732 (1985).

The general "arbitrary and capricious" standard of review employed by most circuits has frequently led plan participants to challenge as "arbitrary" plan provisions which result in ineligibility for benefits in particular circumstances. Such contentions misapprehend the role of the courts and judicial review under ERISA. ERISA provides only for judicial review of the denial of a benefit claim (whether under an "arbitrary and capricious" or any other standard of review) *given* the terms of the benefit plan. 29 U.S.C. § 1132(a)(1)(B). Except in areas where the statute imposes substantive requirements for plans—and it contains no such requirements for welfare benefit plans—participants may not challenge *the terms of the plan itself* as "arbitrary" or "unreasonable." Courts are not authorized to redraft plan eligibility requirements to provide benefits for particular employees based on claims of "unfairness," to "better accomplish the purpose" of the benefit plan, or to avoid "harsh results" caused by the application of an eligibility rule to individual circumstances.

There is no disagreement among the circuits on these principles. For example, in *Moore v. Reynolds Metals Co. Ret. Program,* 740 F.2d 454 (6th Cir. 1984), *cert. denied,* 469 U.S. 1109 (1985), a plan provision requiring a five-month waiting period for disability retirement resulted in a loss of all retirement benefits by a dependent spouse of an employee who became disabled but died before the end of the waiting period. The court held that the spouse could not attack the plan provision as illegally "arbitrary and capricious":

> [O]nce a plan is established and is governed by the requirements of ERISA, courts may review a decision by trustees to deny benefits . . . . Such review, however, is limited to a determination of whether the trustees' actions in *administering* or *interpreting* a plan's provisions are arbitrary and capricious . . . . Courts . . . have not been authorized by Congress to impose upon employers the court's subjective beliefs concerning the relative value of benefits which employers have chosen voluntarily to confer upon employees.

740 F.2d at 457 (emphasis added; citations omitted). *Accord, e.g., Norman v. United Mine Workers of America Health and Ret. Funds,* 755 F.2d 509, 510 (6th Cir. 1985); *Sharron v. Amalgamated Ins. Agency Services, Inc.,* 704 F.2d 562, 569 (11th Cir. 1983); *Torimino v. United Food and Com. Workers Int'l Union Indus. Pension Fund,* 548 F. Supp. 1012, 1014-15 (E.D. Mo. 1982), *aff'd,* 712 F.2d 882 (8th Cir. 1983); *cf. United Mine Workers of America Health & Ret. Funds v. Robinson,* 455 U.S. 562, 573-76 (1982) (court has no authority under 29 U.S.C. § 186 to review for substantive reasonableness terms of pension plan created pursuant to collective bargaining agreement).

Accordingly, the courts below correctly rejected petitioners' contentions which implicitly challenge the substantive content of the severance policy here. (Pet. App. at A20-A21, A42) Claims by petitioners that their employment with Cropmate was "insecure" are legally immaterial under ERISA. Because they were in fact employed by Cropmate, they are not eligible for severance under the express terms of the Policy, notwithstanding any claim that the plan's term is "unreasonable" or "arbitrary" in application to their individual situations.

Petitioners' argument that they should receive severance from Amoco because Cropmate did not have a sever-

ance plan of its own suffers the same legal deficiencies. Under the F & P Severance Policy, the criterion for severance is—and is only—whether the employee is offered a job by a purchaser of the facility. There is no term providing that severance will be paid if the purchaser has no severance plan and the employee loses his job in the future. Under ERISA, that is the end of the matter. There is *no* requirement that a benefit plan contain such additional criteria.

IV. Plan Participants Are Not Entitled To Benefits Contrary To The Terms Of The Plan Based On Procedural ERISA Violations Which Caused No Prejudice To Any Benefit Right Or Any Other Substantive Harm.

Petitioners' final argument, albeit confusingly interspersed with their other contentions, is that they should receive severance benefits because respondents violated disclosure and other "procedural" ERISA requirements. This argument is based upon numerous "factual" assertions contrary to the undisputed evidence of record and is refuted by uniform case law from all circuits which have considered the issue.

The Petition asserts that "Respondents totally ignored the ERISA mandates of disclosure and all other applicable procedures, especially the provision of a meaningful claims procedure as mandated in 29 U.S.C. § 1133." (Pet. at 17) This contention regarding the "claims procedure" and "29 U.S.C. § 1133" is squarely contradicted by the terms of the F & P Severance Policy which, although not quoted in the District Court's opinion, established the required procedure. It is also refuted by the uncontradicted evidence, detailed in the District Court's opinion, demonstrating that petitioners' claims for sever-

ance benefits were processed properly and in the ordinary course. (*See* Pet. App. at A14-A16)

Petitioners also urge that they were not given a summary plan description for severance benefits as required by 29 U.S.C. §§ 1022, 1024. However, the undisputed evidence establishes that in early August, 1982, within days after the divestiture plan was approved and the F & P Severance Policy was created, petitioners were repeatedly told, both orally and in writing, of the material facts—*i.e.*, that Amoco would try to sell the F & P Division and in any event planned eventually to leave the business, that severance benefits would be paid to employees who were not offered employment by any purchaser of their facility, and that severance would not be paid to employees who were offered a job. *See* pp. 5-7, *supra*.

Amoco and Standard disagree with the Seventh Circuit's statement that:

> [T]he employees were not made aware that they were now ineligible for benefits if they received *any* offer of employment from a potential purchaser rather than an offer of *comparable* employment, as previously set forth in the 1981 severance policy. Nor did a later press release or a "Question and Answer" brochure make this clear.

(Pet. App. at A29; emphasis in original). The written documents specifically stated the material terms of the F & P Severance Policy using the identical words: That severance (1) would be paid to employees who were "not offered employment" by a purchaser and (2) would not be paid to employees who were "offered a job." *See* pp. 5-7, *supra*. And as one of the petitioners testified, the employees were also orally told that:

> [I]f you were offered a job with the new company you wouldn't receive severance, if you're not offered

a job, you would receive. You wouldn't receive if you were offered a job, you would receive if you weren't.

In any event, petitioners submitted no evidence that, after these oral and written disclosures in August, 1982, any of them "misunderstood" the "job offer" rule and believed that he would receive severance if he was not offered a "comparable" job. Nor is there evidence that petitioners' benefit rights were in any way prejudiced by such a misunderstanding, or even that they continued their employment with Amoco rather than leaving the company based upon such a misunderstanding. Nor is there evidence of any substantive harm or prejudice to petitioners' benefit rights based upon a failure to describe the severance policy in a document entitled "summary plan description." (*See* Pet. App. at A21) In such circumstances, the circuit courts of appeals have repeatedly and consistently held that "procedural" defects in creating or disclosing a severance benefit plan do *not* create a substantive entitlement to benefits. *E.g., Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517, 524-25 (8th Cir. 1988); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623, 627 n.10 (6th Cir. 1987); *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1149-50 (4th Cir. 1985), *aff'd*, 477 U.S. 901, *cert. denied*, 477 U.S. 903 (1986); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1521 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985); *Pabst Brewing Co. v. Anger*, 610 F. Supp. 214, 216 (D. Minn. 1985), *aff'd on basis of district court opinion*, 784 F.2d 338 (8th Cir. 1986).[11]

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[11]Because the cases cited above involved severance plans which did not expressly address the "sale-of-business/subsequent employment with the purchaser" situation, one issue presented was whether the plan had been erroneously *interpreted* (*i.e.*,

(Continued on following page)

Petitioners argue the contrary based on *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985), but that case is inapposite and there is no circuit split on this issue. First, in *Blau*, the employer had "flouted in . . . a wholesale and flagrant manner" "virtually every applicable mandate of ERISA." *Id.* at 1353. Among other things, the employees were never told of the severance policy or its terms and it was "actively concealed" from them, they were never informed of the decision to deny benefits, they were never told of a procedure for filing a claim for benefits, and the plan in fact had no such procedures. *Id.* at 1351-53. Not one of those factors is presented in this case, let alone all of them.

Subsequent circuit decisions (including one by the Ninth Circuit which decided *Blau*) have confined the holding in *Blau* to such "wholesale and flagrant" violations of ERISA. In *Holland v. Burlington Indus.*, for example, employees who were given a "general statement of [the severance] policy" and "promptly informed . . . that severance pay was not available" when the business was sold, were not entitled to severance benefits on the basis of "procedural violations." 772 F.2d at 1149-50. *Accord*,

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(Continued from previous page)

whether the participants were entitled to benefits *under the terms* of the plan). In that context, certain of those cases considered whether "procedural" ERISA violations justified departure from the "arbitrary and capricious" standard of review. *See Holland*, 772 F.2d at 1149; *Anderson*, 759 F.2d at 1521. The latter issue is similar to the one before this Court in *Firestone v. Bruch*, No. 87-1054. For the reason stated in Part I, *supra*, no such issue is fairly presented in this case. Here, the F & P Severance Policy expressly addresses the "sale-of-business" situation and expressly provides that employees who are offered a job by a purchaser are ineligible for severance. Hence, petitioners here are not entitled to benefits unless a procedural ERISA violation which causes no prejudice or injury permits plan participants to *override* the terms of their benefit plan.

e.g., Simmons v. Diamond Shamrock, 844 F.2d at 524-25; *Anderson v. Ciba-Geigy,* 759 F.2d at 1521-23; *Jung v. FMC Corp.,* 755 F.2d 708, 714-15 (9th Cir. 1985).

Second, in *Blau,* the severance policy did *not* address the "sale of business" situation and bar benefits to employees who went to work for a purchaser. Hence the issue was whether the plan administrator had erroneously interpreted the policy to "impose[] . . . standards not required [by its terms]. 748 F.2d at 1354-55. In this case, by contrast, the "job offer" eligibility condition appears on the face of the F & P Severance Policy.

Nothing in *Blau* (or any other case) suggests that procedural ERISA violations which cause no substantive harm permit plan participants to override the express terms of the benefit plan. To the contrary, the *Blau* court noted that under ERISA, a court on review "has no authority to [re]draft the substantive content of [welfare benefit] plans." *Id.* at 1353. *See also, id.* at 1354 n.2. And as that same court held in a later case, under ERISA:

> Procedural defects do not necessarily require substantive remedies. A substantive remedy would be appropriate only if the procedural defects caused a substantive violation or themselves worked a substantive harm.

Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1096 (9th Cir. 1985) (citations omitted).

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CONCLUSION

The decision below is correct and conforms with the uniform view among the circuits on each of the issues fairly presented by this case. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 88-496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP A. YOUNG, MAX GOSSARD, ROBERT L. BROEKER, MARK BOKELMAN, JAMES ROHLF, OLIVER E. MOLDESTAD, LARRY GODEJAHN, EMERY PISTULKA, AND ARTHUR REINSMA,
Petitioners,

VS.

STANDARD OIL (INDIANA) AND AMOCO OIL COMPANY,
Respondents.

PETITIONERS' REPLY BRIEF

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No. 88-496

IN THE

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Petitioners,

VS.

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Respondents.

PETITIONERS' REPLY BRIEF

I. RESPONDENTS IGNORE OR MISSTATE CRUCIAL FACTS NECESSARY TO THE DETERMINATION OF THIS CASE

That the Respondents conveniently omit or misstate the following facts from their brief:

1. Respondents have maintained written severance pay plans since 1965. (Petition for Writ of Cert. p. 4, Footnote 2) (hereinafter Pet. Cert.)

2. Respondents have never distributed a summary plan description as to the severance plan or any changes made through the years or even included a statement concerning severance though they periodically published and distributed sophisticated Benefit Booklets. (Exhibit L to Second Amended Class Action Complaint).

3. The Respondents never made the text of their severance plans available for inspection by the F&P employees.

4. Divestment plans for the F&P Division began in 1981. (Pet. Cert. p. 3).

5. The Sale Letter and Q&A Forms of August 1982 did not disclose that there had been a special change in Respondents' severance pay plan for the F&P only and that the change was made in anticipation of a sale of the F&P and the termination of all F&P employees (the most valuable asset of the division) from Amoco. (Pet. Cert. p. 5).

6. Whenever the Petitioners sought more information about severance from Respondents they were rebuffed. (Pet. Cert. p. 6).

7. The Respondents totally ignore the fact that Amoco was actively promoting the sale of their plants to their F&P employees on behalf of Schouler in order that the money could be used to pay the purchase price of the F&P Division to Amoco.

II. RESPONDENTS' BRIEF IN OPPOSITION ATTEMPTS TO NARROWLY FOCUS THIS COURT ON SPECIFIC SECTIONS OF ERISA WHILE IGNORING THE PURPOSES AND POLICIES OF ERISA.

Respondents' Brief In Opposition generally ignores the purposes and policies of ERISA which motivated its creation. ERISA was enacted to protect employee/participants' interests in their employers' various welfare benefit plans through strict disclosure requirements resulting in an informed work force who could then enforce their rights and insure reasonable, accountable and equitable administration of these plans.[1]

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[1] 29 U.S.C. §1001; H.R. Rep. 93-1280, 93rd Cong. 2d Sess. 32 (1974) (conference report), *reprinted in*, 3 *Legislative History of the Employee Retirement Income Security Act of 1974* at 4594, 4745 (hereinafter *Leg. Hist.*); S. Rep. 93-127, 93rd Cong. 2d Sess. 29 (1974)

The purposes and policies of ERISA are the backbone of the decision in *Bruch v. Firestone Tire and Rubber Company*, 828 F.2d 134 (3rd Cir. 1987), *cert. granted*, Dkt. 87-1054.

Counsel for Respondents would have us believe that *Bruch* is an interpretation case, nothing more and nothing less, as concerns the arbitrary and capricious standard of review.[2] Nothing could be further from the truth. *Bruch* goes beyond the "four corner" sterility of fiduciary review by expanding the arbitrary and capricious test to include consideration of whether a fiduciary has acted in good faith in the exercise of his duties. As set forth in *Bruch*, the purposes and policies of ERISA are the heart and soul of this case and should be the standard for judicial review.

III. THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW AS ASSERTED BY THE RESPONDENTS IS TOO NARROW, RESTRICTIVE, EFFECTIVELY EMASCULATES ERISA, AND THERE IS A GREAT CONFLICT BETWEEN THE CIRCUITS ON THE PROPER STANDARD REVIEW OF WELFARE BENEFITS UNDER ERISA.

To begin with, the Respondents fail to note that the employer is also the plan administrator in this case thus eliminating the deference that could be shown its actions and decisions.[3] That given the intent of Congress in the creation of ERISA, good faith behaviour must be an element of the arbitrary and capricious standard of reviewing a fiduciary's actions and decisions. The assumption of good faith behaviour runs through

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[2] Respondents' Brief in Opposition at 11. (hereinafter Resp. Brief).

[3] *Bruch v. Firestone Tire and Rubber Company*, 828 F.2d 134 (3rd Cir. 1987) (cert. granted), Dkt. 87-1054, See Brief of Respondents in *Bruch* (hereinafter *Bruch* Brief) which sets out the conflict between the circuits.

out of all of our common and statutory law regardless of topic. ERISA cannot be a place for the employer/fiduciary to hide the advancement of its whims by asserting good faith is irrelevant. An employer/fiduciary's good faith should always be suspect when its decision will save $6.2 million of its own profits.

The issues raised in this case are even more complex than those raised in *Bruch*. Here we are faced with an employer/fiduciary who: (1), has continually ignored the notice and disclosure requirements of ERISA as to severance from the time the act was passed[4]; (2), secretly amends an existing company wide severance policy after it has taken action which it determined in writing would make severance payable to F&P employees resulting in a $6.2 million windfall profit to the employer/fiduciary at the expense of F&P plan participants; (3), relies on undisclosed and secreted amendment language within a prior undisclosed plan; (4), actively thwarts employees' efforts to obtain additional information concerning their severance plan; and (5), evidences a wanton and willfull disregard of good faith by attempting to coherce the F&P employees to indirectly finance its sale.[5]

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[4] 29 U.S.C. §1102(a)(1); 29 U.S.C. §1021-31; 29 U.S.C. §1133. compliance with ERISA disclosure requirement is the threshold showing of good faith. Here Respondents have failed to even meet the threshold since 1975.

[5] When Petitioners received their first ever written materials on severance (other than the 1970 "Stoker" Letter announcing severance as a "established benefit plan") in August 1982, it consisted of a Question and Answer Form and Letter which the Seventh Circuit Court of Appeals found to be unclear and Petitioners assert are statutorily insufficient and show a lack of good faith. Pet. App. at A29. Such documents failed to name the plan administrator or state that the severance plan to be applied to Petitioners was only for the F&P employees and was a change from the current Amoco Severance Policy. The Amoco Severance Policy's actual terms were so secret that even the Manager of the F&P Division admitted that he had never seen its text until Respondents' counsel showed it to him in preparation for Petitioners' deposition. The claims procedure set forth in the

Respondents assert that the above enumerated behaviour is entirely legitimate and further assert, at page 23 of their Brief, that "ERISA provides only for judicial review of the denial of a benefit claim (whether under an "arbitrary and capricious" or any other standard of review) *given* the terms of the benefit plan," citing 29 U.S.C. §1132(a)(1)(B) (emphasis theirs). However, Respondents failed to note 29 U.S.C. §1132(a)(3)(A) and (B) allows participants to sue "to enjoin *any* act or practice which violates *any* provision of this title or terms of the plan, or (B) to obtain other *appropriate equitable relief* (i) to redress such violations or (ii) to enforce *any provisions of this title* or the terms of the plan." (emphasis added) Section 1132 read as whole provides for a plethora of remedies to be determined by the Court as needed to correct employer transgressions of the law and certainly does not limit the scope of the Court's review of the actions and decisions of a plan fiduciary to the four corners of the plan instrument.[6] ERISA must be interpreted as a whole. Judicial review cannot be limited to single sections of the statute or to rote review of the employer/fiduciary's interpretation of a plan's language when plans are written (and changed) by employers eager to manipulate the employee protection policy and nature of ERISA.

Q&A Form and Letter consisted of "Please contact your immediate supervisor if you have questions regarding the transition. Questions concerning your Amoco Oil benefits should be directed to Lucy Wilcox (312) 789-4934 or Sharon Zorn (312) 789-4966." When Petitioner Young attempted to get a copy of the severance policy by calling Lucy Wilcox as per the instructions, he was rudely refused the documents requested (See Pet. Cert. at 6, Footnote 5). Later, when F&P employees asked oral questions about severance at Amoco company meetings, they were rebuffed. Only after Petitioners from Indiana hired legal counsel who literally guessed on where to send a demand letter for severance was a copy of the Special F&P Severance Policy obtained. Further, it was not obtained in a timely manner and was received after legal proceedings had been commenced in Indiana.

[6] *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134 (1985); *See also* (Brennan, J., concurring); *See also* 29 U.S.C. §1024(b)(4); 29 U.S.C. §1133.

After asserting that procedural violations are not substantive, Respondents further assert that the Petitioners were not prejudiced by Respondents' failure to fully disclose the existence, terms and changes made in their severance plan. By common sense, an uninformed employee does not have the ability to police his rights in an unknown plan thus frustrating the basic goal of ERISA as clearly enunciated in 29 U.S.C. §1001.[7] Respondents urge the Court to accept the premise that an employer can promise an employee anything, actively conceal its ability to renege on the promise, and thus manipulate the situation to avoid that promise. It is unfathomable that this was the intent of Congress and Courts have concurred.[8] If Respondents' arguments are followed to their logical conclusion, ERISA actually diminishes employee rights as to their welfare benefits. Further, they are requesting the Court to throw out the statutory requirements placed by Congress in ERISA, ignore all common law and condone self dealing.

Before closing this argument, Petitioners need to assert that the foregoing does not mean that welfare benefit plans can never be amended, but when amended, or even terminated, employers must do so in good faith and pursuant to all ERISA notice and disclosure requirements. Respondents rely on language contained in their 1981 (and prior) Severance Plans retaining the right to amend. Respondents refuse to recognize

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[7] H. Rep. No. 533, 2 *Leg. Hist.* at 2358; Sen. Rep. No. 93-127, *supra* at 27, 1 *Leg. Hist.* at 613; 120 Cong. Rec. 4284 (1974), *reprinted in* 2 *Leg. Hist.* at 3386-87; 120 Cong. Rec. 29, 195 (1974), *reprinted in* 3 *Leg. Hist.* at 4665; 120 Cong. Rec. 4287 (1974), *reprinted in* 2 *Leg. Hist.* at 3395; 120 Cong. Rec. 4278 (1974), *reprinted in* 2 *Leg. Hist.* at 3360.

[8] *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied,* 474 U.S. 865 (1985); *Deak v. Masters, Mates and Pilots Pension Plan,* 821 F.2d 572 (11th Cir. 1987) *cert. denied,* 108 Sup. Ct. 698 (1988); *Bruch, supra; Jordan v. Central Louisiana Telephone Company, et al.*, 525 So.2d 1079, (La.App. 3 Cir. 1988).

that they totally failed to disclose the entire text of the plans or summarize in a SPD resulting in the total ignorance of the Petitioners. This result is what ERISA specifically contemplates avoiding through its mandatory disclosure and notice requirements.[9] Further, Courts cannot review an employer/fiduciary's decision in a total void. To insure good faith, the surrounding circumstances must be reviewed. *See* cases cited in Footnote 8. Lower Courts in other cases found changes to welfare benefit plans valid, it was due to some redeeming value or show of good faith (i.e. full plan disclosure, employee knowledge of the employer's right to amend, union negotiation for employees, or similar plan maintained by acquiring company); none of which is present in this case.[10]

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[9] Respondents cite three totally inapplicable cases to support their reliance on plan language retaining the right to amend. *Cattlin v. General Motors Corp.*, 641 F.Supp. 591 (E.D. Mich. 1986) where plaintiffs had written documentation that GM reserved the right to amend their 30 and out program; *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987) which is not about retaining the right to amend; *In re White Farm Equip. Co.*, 788 F.2d 1186 (6th Cir. 1986) where in summary booklets distributed to employees the company reserved the power to terminate plans. Space limitations prevent Petitioners from pointing out all the numerous incidents in Respondents' Brief in Opposition where cases cited appear inapplicable to the point being made.

[10] Counsel for Amoco cites the following cases to support their position but fails to point out that either the notice requirements of ERISA were met, the employer made additional good faith efforts, or the employees were represented by a union assuring knowledge of benefits. *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) where a union negotiated to have the new company continue the severance policy; *Bencivenga v. Western Pa. Teamsters and Employers Pension Fund*, 763 F.2d 574 (3rd Cir. 1985) moot case as ERISA has been amended to prevent this problem; *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986) where the company was in process of amending all retirement plans not in anticipation of a specific event; *United Ind. Flight Officers, Inc. v. United Air Lines*, 756 F.2d 262 (7th Cir. 1985) again a union negotiated amendments to benefits. (*See* also *Bruch* Brief, Footnote 15).

In no other case cited by either party has there been such a total disregard for the statutory requirements (disclosure) of ERISA, total lack of good faith and the presence of a such wanton disregard of the rights of the employees by an employer as in the instant case.[11]

IV. PETITIONERS HAVE COMPLIED WITH JURISDICTIONAL REQUIREMENTS FOR FILING

The Petition for Writ of Certiorari in this cause meets the ninety (90) day jurisdictional limitation as said Petition was placed in the United States Mail on September 21, 1988, which was the due date. Counsel for Petitioners, after consultation with the Supreme Court's Clerk's office sent their original Affidavit of Mailing. As Supreme Court Rule 28.2 does not set forth a time period for the Affidavit of Mailing to be sent, counsel for Petitioners, as a show of good faith, have submitted a second Affidavit of Mailing mailed after the Petition for Writ of Certiorari was timely filed stating said Petition was timely mailed as the rule requires.

CONCLUSION

This Court cannot ignore the statutory requirements and the purposes and policies set forth in ERISA as Respondents so advocate. To narrow or restrict the judicial review of the actions

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[11] Space limitations on appeal prevent Petitioners from listing in detail all transgressions from statutory requirements and of good faith by Respondents but almost every area that has troubled the district and circuit courts in their decisions concerning severance welfare benefits is covered in this case including, but not limited to: a policy whose text (including the right to amend) is secreted, failure to prepare and distribute SPD's, past practices of payment of severance, payment of benefit from general funds of employer, refusal to provide benefit documents upon request, self dealing and coercian in a sale situation, lack of union representation, lack of job security with new employer, the fact that Cropmate (Purchaser) had no severance policy and Respondents retained no liability for severance, etc.

and decisions of an employer/fiduciary as espoused by Respondents is clearly contrary to the equitable nature of the statute as a whole and specifically 29 U.S.C. 1132(a)(3)(A) and (B). The Court has before it in this case practically every transgression of ERISA yet concocted by Corporate America designed to circumvent ERISA and prevent the Petitioners from their rightful enjoyment of their severance pay.

This Court must clear the confusion in the Circuits by creating a uniform standard for reviewing the performance of an employer/fiduciary in carrying out all of its duties as contemplated by ERISA. The arbitrary and capricious review advocated by the Respondents is too narrow and restrictive as it has been historically developed from the Labor Management Relations Act. Given the stated goals of ERISA, the arbitrary and capricious standard of review must be broadened to include good faith and contemplate the totality of actions of an employer. The Court should not allow large companies to technically manipulate a statute designed to assist and protect the employee and blatantly ignore all notice, disclosure and other good faith requirements placed in ERISA by Congress without penalty.

For the reasons discussed in the Petition and in this Reply Brief, the Court should grant the Petition for Writ of Certiorari to reconcile the intercircuit conflicts on all of the issues presented by this case.

Respectfully submitted,

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